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2022AP636, 2022AP1030, 2022AP1290, 2022AP1423

In the State of Wisconsin Court of Appeals, District II

American Oversight,
Petitioner-Respondent,
v.
Assembly Office of Special Counsel,
Respondent-Appellant,

Robin Vos, Edward Blazel and Wisconsin State Assembly,
Respondents

On Appeal from Circuit Court for Dane County
Case No. 2021CV003007, Honorable Frank D. Remington, Presiding

Opening Brief of Respondent-Appellant Assembly Office of Special Counsel and Appellants James Bopp, Jr., Courtney Turner Milbank, Joseph Maughon, Cassandra Dougherty, J Michael Massie, and Michael D. Dean

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Statement of the Issues

I. Whether the circuit court erred in ordering OSC to produce investigation documents and in imposing punitive damages under Wisconsin's Public Records Law.

The circuit court erred in ordering OSC to produce investigation documents and in imposing punitive damages under Wisconsin's Public Records Law, Wis. Stat. § 19.31, *et seq*.[1] ("**Public Records Law**"), Decision and Order, R. 165:15–29, R-App. 26–40 ("**Mandamus Order**"), Decision and Order, R. 177, R-App. 64 ("**Order Denying Stay**"), despite four exemptions being applicable to the Assembly Office of Special Counsel's ("**OSC**") investigatory documents: (**1**) the Assembly's constitutional authority to maintain confidentiality in its investigations, (**2**) a statutory exception, (**3)** a common law exception, and (**4**) the public interest in secrecy outweighing the interest in disclosure.

II. Whether the circuit court erred in finding OSC in contempt and in issuing remedial sanctions.

The circuit court erroneously found OSC in contempt for alleged failure to produce records and issued remedial sanctions of $2,000 per day, until the contempt was purged by non-party Michael Gableman ("**Gableman**"), Decision and Order, R. 327:25, R-App. 107 ("**Contempt Order**"), despite (**1**) OSC having already produced the requested documents and (**2**) the circuit court's erroneous denial of OSC's motion to continue, which deprived OSC of its sole witness, thereby preventing it from presenting a defense to the contempt, after statements made by the circuit court—which OSC's sole witness perceived as a threat—caused him to retain independent counsel and, on his advice, to not appear at the contempt hearing, 6/10/22 Hr'g Tr., R. 322:4:19–5:23, 12:23–13:19, R-App. 256:19–257:23, 264:23–265:19. The circuit court also erred in imposing remedial

[1]References to the Wisconsin Statutes are to the 2019-20 version, unless noted.

sanctions, which were not within the power of OSC, nor reasonably related to the contempt.

III. Whether the circuit court erred in refusing to continue the contempt hearing.

The circuit court erroneously refused to grant OSC's timely request for a continuance of the contempt hearing, 6/10/22 Hr'g Tr., R. 322:50:12–14, R-App. 273:12–14, when OSC's sole witness declined to appear, following the perceived threats by the circuit court, and when, following the circuit court's own suggestion, the witness obtained personal counsel who informed OSC counsel after business hours the night before the contempt hearing that the witness would not appear and testify, 6/10/22 Hr'g Tr., R. 322:4:19–5:23, 10:10–15, 13:4–22, R-App. 256:19–257:23, 262:10–15, 265:4–22.

IV. Whether the circuit court erred in declining to recuse.

The circuit court erroneously denied OSC's Motion to Recuse and corresponding brief, Rs. 376, 377 (**"Recusal Motion**"), Decision and Order, R. 379, R-App. 108 ("**Recusal Order**"), despite manifold behaviors throughout the case which, either on their own or in totality, showed: (a) actual bias or an appearance of bias revealing a great risk of actual bias and (b) a need for a proper subjective determination whether the court's actions created the appearance of bias in light of the totality of the circumstances, as required by Wis. Stat. § 757.19(2)(g).

V. Whether the circuit court erred in revoking BLF Attorneys' pro hac vice admissions.

The circuit court erroneously *sua sponte* revoked all The Bopp Law Firm, PC attorneys' ("**BLF Attorneys**") pro hac vice admissions, Supplement to the Court's July 18, 2022 Decision Denying OSC's Motion to Recuse, R. 423:2–3, 86–90, R-App. 116–117, 200–204 ("**Recusal Supplement**" or "**Recusal Supp.**"),

without factual or legal justification, and without notice, hearing, or opportunity to respond.

VI. Whether the circuit court erred in finding OSC Attorneys'[2] conduct was sanctionable.

The circuit court erroneously found OSC Attorneys' conduct was sanctionable, *id*. at 423:88–89, R-App. 202–203, without factual or legal justification, and without notice, hearing, or opportunity to respond.

Oral Argument is Necessary

Given the complexity of these issues and because none of the criteria under Wis. Stat. Rule 809.22(2)(a) is satisfied for submission of the case on briefs (i.e., OSC's arguments are supported by legal authority, have merit, and involve important questions of law and fact), oral argument is necessary. *See, e.g.*, Wis. Stat. Rule 809.22.

Moreover, while some issues can be resolved based on relatively limited, undisputed facts in the record, others are fact-intensive and depend upon an extended record—which is procedurally complex and includes more than 1,500 pages of OSC records, several hundred pages of briefing, and several hundred pages of oral argument and colloquy involving statements and conduct of both the circuit court and parties that are, at times, also cited with time-stamp citations in the Wisconsin Eye video record. Many of the issues are also inter-related. It would, therefore, be exceptionally helpful to this Court to have counsel, with mastery of the record and issues, present for oral argument to identify citations in the record responsive to any questions this Court finds significant, to respond to questions exploring implications of affirming the circuit court's decisions, and to provide context and related legal and record citations.

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[2]OSC Attorneys include BLF Attorneys and Wisconsin Local Counsel Michael Dean. Pursuant to Wis. Stat. Rule 809.19(5)(a), OSC and OSC Attorneys file this brief jointly.

Accordingly, oral argument is both necessary and would be exceptionally helpful to this Court.

The Opinion Should Be Published

This decision, being one of "substantial and continuing public interest[,]" which will likely lead to modification/clarification of an existing rule, which "[c]ontributes to the legal literature by collecting case law or reciting legislative history[,]" and "[a]pplies an established rule of law to a factual situation significantly different from that in published opinions[,]" Wis. Stat. Rule 809.23, should be published.

Statement of the Case

I. Nature of the Case

This is an action brought pursuant to the Public Records Law. Wis. Stat. § 19.31, *et seq*.

II. Procedural History

A. Petition for Writ of Mandamus and Mandamus Order

This case was initiated by Plaintiff American Oversight's ("**AO**") Petition for Writ of Mandamus, R. 5 ("**Mandamus Petition**") involving alleged failure to produce public records requested in September and October 2021. Mandamus Order, R. 165:3–4, R-App. 14–15.[3] In issuing the Mandamus Order, denying OSC's Motion to Dismiss or Quash Petition and corresponding brief, Rs. 98, 99 ("**Dismissal Motion**"), the circuit court erroneously determined that no exemptions to disclosure existed here, ordered OSC to produce all responsive records, and

[3]The circuit court originally issued an Alternative Writ of Mandamus ordering OSC to "immediately . . . release the records responsive to Petitioner's request, or in the alternative to show cause to the contrary . . . on January 21[, 2022.]" R. 42, R-App. 4. It subsequently ordered there were no exemptions to disclosure on March 2, 2022. *See generally* Mandamus Order, R. 165, R-App. 11.

imposed $1,000 in punitive damages. Mandamus Order, R. 165, R-App. 11; Order Denying Stay, R. 177, R-App. 64. However, four separate exemptions applied.

OSC's notice of appeal was filed April 19, 2022 (No. 2022AP636). R. 187; Amended Notice of Appeal, R. 502 (filed October 13, 2022) (appealing Petitioner's Bill of Costs and Judgment Against OSC, R. 497, R-App. 319 ("**Judgment**")).

B. Modify Motion and Subsequent Contempt Proceedings

AO subsequently filed a Motion to Reopen and Modify the Court's Order and corresponding brief ("**Modify Motion**"), Rs. 194, 196, seeking "to modify the [court's Mandamus Order] and determine whether further relief is warranted," *id*. at 196:11, which the circuit court erroneously *sua sponte* converted to a motion for contempt. Despite there being no document unproduced and despite OSC's inability to present a defense, the circuit court erroneously denied the request for a continuance, found OSC in contempt, and issued remedial sanctions of $2,000 a day and purge conditions. Contempt Order, R. 327:16–18, 25, R-App. 98–100, 107.

OSC's notice of appeal was filed June, 17, 2022 (No. 2022AP1030). R. 331.

C. Recusal Motion

Following much actual and apparent bias from the beginning of the case, on July 15, 2022, OSC filed a Recusal Motion, Rs. 376, 377, which the circuit court summarily denied. Recusal Order, R. 379, R-App. 108.

OSC sought leave to appeal, which was granted September 1, 2022 (2022AP1290). Rs. 401, 442.

D. Pro Hac Vice Revocation, Counsel Conduct Sanction Finding, and Purge Finding

Finally, the circuit court, in apparent response to OSC's appeal of the Recusal Order[4]—which criticized the Recusal Order for abusing the court's discretion "by not responding more thoroughly to its motion to recuse[,]" Recusal Supp., R. 423:2, R-App. 116; OSC's Petition to Appeal Non-Final Order and Request for Temporary Relief, R. 401:31 ("**Recusal Appeal**")—issued a 90-page supplement, Recusal Supp., R. 423, R-App. 114, in which the circuit court sought to "more thoroughly address OSC's [recusal] arguments," *id*. at 423:2, 4–86, R-App. 116, 118–200, revoked BLF Attorneys' pro hac vice admissions, *id*. at 423:86–90, R-App. 200–204, and found OSC Attorneys' conduct sanctionable, *id*. at 423:88–90, R-App. 202–203. It also issued an additional order finding the purge conditions had been satisfied (though no additional document was found) and imposed $24,000 in sanctions. Decision and Order Finding OSC Has Purged its Contempt, R. 424:3, R-App. 208 ("**Purge Order**").

OSC's and OSC Attorneys' notices of appeal were filed August 22, 2022 and September 26, 2022, respectively (2022AP1423). Rs. 429, 487.

E. Appellate Consolidation

The four appeals were consolidated. June 30, 2022 Order, R. 354, September 1, 2022 Order, R. 439, and December 14, 2022 Order, R. 514.[5]

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[4]"I have reviewed the filing in the Court of Appeals about the previous motion . . . to recuse [], and I intend this week to issue a supplemental decision responding . . . in depth[.]" 8/16/22 Hr'g Tr., R. 438:13:3–7.

[5]A fifth appeal concerning attorney fees issues is docketed at 2022AP1516 and is currently stayed. December 14, 2022 Order, R. 514.

III. Facts[6]

A. The Elections Investigation

Following the 2020 Wisconsin election, the Assembly determined that "the integrity of [the] electoral process ha[d] been jeopardized[.]" 2021 Assembly Resolution 15, R. 101:2:1–5, R-App. 277:1–5 ("**Resolution 15**"). In light of this concern, it directed "the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019[]" ("**Investigation**"). *Id*. at 101:2:10–13, R-App. 277:10–13. Pursuant to this investigation, the Assembly entered into a contract with Gableman, through his company, Consultare, LLC ("**Consultare**"). Coordinating Attorney Independent Contractor Agreement, R. 36:2–5, R-App. 303–306 ("**Gableman Contract**"). The agreement provided that Gableman was to oversee OSC and was required to keep investigation records confidential. *Id*. at 36:2, R-App. 303.

This contractual relationship continued from June 25, 2021, *id*., until August 12, 2022, Gableman Termination Letter by Assembly Speaker Vos, R. 419:3, R-App. 318 ("**Gableman Termination Letter**"). While the contract with Gableman was terminated, OSC has not been closed.

B. Petition for Writ of Mandamus

1. AO's Record Requests

In September and October 2021, AO served public records requests upon OSC, summarized as follows:

- Any contracts between the legislative respondents and the OSC; resumes, applications, work proposals, and the like; any records related to "the scope of the investigative authority of" OSC; any records "detailing the steps or procedures to

[6]Due to the complexity and number of issues involved in this appeal, OSC has summarized the most relevant facts with appropriate citations to the record, pursuant to Wis. Stat. Rule 809.19(1)(d). Those facts will be expanded upon in the relevant argument sections to aid the Court's review.

> be followed in each aspect of the investigation;" invoices in connection to the investigation; and "criteria, schedule, or other guidelines" for completion of the investigation.
> - An updated request identical to the above but for a new date range.
> - Interim reports, analyses, and other work product related to election fraud.
> - An updated request identical to the above, but for a new date range.
> - "All electronic communications" between OSC staff, plus any "calendars or calendar entries" relating to the investigation.
> - An updated request identical to the above, but for a new date range.
> - Communications between the respective authority and forty-four entities, which American Oversight specified by name and email address.

Mandamus Order, R. 165:3–4, R-App. 14–15 (internal citations to the record omitted).

2. OSC Search and Initial Record Production

OSC produced, on December 4, 2021, records that would not compromise its investigation, stating, "Some documents that contain strategic information to our investigation will continue to be hel[d] until the conclusion of our investigation." Mandamus Order, R. 165:4–5, R-App. 15–16.

3. Circuit Court Petition Order

After denying OSC's reasonable request for a continuance, based chiefly on AO's failure to serve OSC, the circuit court held a hearing. *Id*. at 165:5–6, R-App. 16–17. Despite neither having jurisdiction over OSC[7] nor having determined whether any exemptions to production existed, 1/21/22 Hr'g Tr., R. 148:54:3–59:20, the court ordered OSC to produce all documents by January 31 for *in camera* review. *Id*. at 148:32:25–43:3; Order, Jan. 25, 2022, R. 110:2, R-App. 9 ("**Petition Order**"). The circuit court didn't limit production to "records,"

[7]OSC properly objected to jurisdiction as it had not been served, *id*. at 165:6, R-App. 17, arguing pursuant to Wis. Stat. §§ 801.11(4), (5) that allegations in AO's process server's affidavit "d[id] not meet the requirements of the statute," 1/21/22 Hr'g Tr., R. 148:9:1–8, R-App. 217:1–8; *see also id*. at 148:8:17–10:16, R-App. 216:17–218:16. Despite OSC's *legal* objection, the circuit court ordered an evidentiary hearing on the issue, requiring Gableman to testify. *Id.* at 148:11:7–12:3, R-App. 219:7–220:3. Given that the court had seemingly predetermined the issue following a "wink and nod" exchange, *infra* pp. 95, 105–107, OSC voluntarily accepted service on January 26, 2022, before that hearing date, R. 116.

as properly defined in Wis. Stat. § 19.32(2), but instead required production of every single document in the broadest terms.[8]

OSC complied, producing 761 pages of documents. Mandamus Order, R. 165:35–45, R-App. 46–56 (citing Rs. 141–47, 149, 161–64).

4. Circuit Court Mandamus Order, Release of Documents, and Punitive Damages

On March 2, 2022, the circuit court erroneously held that none of OSC's documents were exempt from disclosure. *Id*. at 165:50–51, R-App. 61–62. Additionally, it *sua sponte* awarded punitive damages, *id.* at 165:51, R-App. 62, despite no briefing on punitive damages and despite acknowledging OSC had potential arguments against them. *Id.* at 165:45–51, R-App. 56–62. The court stayed its order *sua sponte* until March 8, 2022, to allow argument on OSC's Motion to Stay Pending Appeal, Rs. 152, 153. Mandamus Order, R. 165:52, R-App. 63.

All documents were released to AO on March 8, 2022. Order Denying Stay, R. 177:15, R-App. 79.

C. Modify Motion and Contempt Proceedings

Thereafter, AO identified a group of documents OSC inadvertently omitted and noted several emails OSC produced were missing attachments. Exhibit A to Affidavit of Christa O. Westerberg, R. 199:2–3. OSC immediately provided the inadvertently omitted contracts and calendars and any e-mail attachments it had already recovered ("**Contracts and Calendars**")[9] on April 8, and committed to

[8] 1/21/22 Hr'g Tr., R. 148:83:11–17, R-App. 239:11–17.

[9] OSC also included one memo from the Legislature Reference Bureau and a w-9 form. *See* Affidavit of Courtney Turner Milbank and Exhibit A, Rs. 261–264.

recovering[10] (and did recover) the remaining attachments ("**Attachments**") even though they had been deleted prior to commencement of AO's action and were therefore not subject to the Mandamus Order. Westerberg Exhibit B., R. 200:4–8.

1. AO's Modify Motion

Despite OSC's voluntary cure, providing the Contracts and Calendars and gathering the Attachments (which were not subject to the circuit court's order), AO filed its Modify Motion on April 20, 2022. Rs. 194, 196. At a status conference six days later, without any response by OSC to the Modify Motion, the circuit court *sua sponte* treated the Modify Motion as a motion for contempt and found AO had made a *prima facie* case of contempt, 4/26/22 Hr'g Tr., R. 324:8:23–9:1, 23:16–21, which shifted the burden to OSC to demonstrate its "contempt" was neither intentional nor continuing.

2. Perceived Threat to OSC Witness

For its case-in-chief in the contempt hearing on June 10, 2022, OSC, as ordered by the circuit court, noticed and intended to call Zakory W. Niemierowicz ("**Niemierowicz**"), a legal custodian for OSC and the person most knowledgeable about OSC's production since he performed the searches himself, as its sole witness to testify that OSC did not intentionally violate the circuit court's order and any violation was not continuing. Def. OSC List of Witnesses, R. 224 ("**OSC Witness List**"); Motion to Quash Subpoena and Exclude from Testifying, R. 255:3 ("**Quash Motion**").

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[10]Even though the Attachments were not subject to the circuit court's orders, OSC volunteered to contact each person in the e-mails and ask them to re-send the Attachments, Exhibit B to Affidavit of Christa O. Westerberg, R. 200:8 ("Westerberg Exhibit B"), and fulfilled its commitment, securing and producing the recovered Attachments to AO on May 13. Affidavit of Courtney Turner Milbank and Exhibit B, Rs. 261, 265–297. The only Attachments not recovered were OSC's interim report drafts, which were not saved. However, the final version of the draft-report attachments is publicly available. *See* https://www.wielectionreview.org/.

However, on a June 8, 2022, hearing on OSC's Quash Motion, the circuit court, speaking directly to Niemierowicz[11] and OSC's counsel, advised Niemierowicz that he may want to seek personal counsel, given his risk of incarceration if he testified at the forthcoming hearing on contempt two days later. The circuit court stated, in part:

> Understanding that one remedial sanction can be incarceration, I wonder whether Mr. Niemierowicz has been apprised of the possibility that he may need to seek independent legal counsel. . . . I'm not suggesting there's a conflict of interest. I am saying that I [] proceed very carefully and extremely cautiously when the question . . . [is] contempt, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. . . . I don't believe anyone is deserving -- certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing.

6/8/22 Hr'g Tr., R. 314:47:4–20, R-App. 251:4–20.

These statements gave the appearance that the court was threatening Niemierowicz that, if he testified, he could be spontaneously jailed and were interpreted by Niemierowicz to that effect. 6/10/22 Hr'g Tr., R. 322:12.23–13:14, R-App. 264:23–265:14. As a result, Niemierowicz sought and obtained private counsel and, on advice of his counsel, refused to attend the hearing and testify. *Id*. at 322:5:3–11, R-App. 257:3–11.

3. Denial of Continuance Due to Absence of OSC's Sole Witness

After multiple conversations with Niemierowicz's personal counsel, OSC's counsel was informed after 6:00 pm on June 9, 2022, that Niemierowicz would not appear at the hearing the next day, because of the circuit court's comments. *Id*. at 322:4:9–5:11, R-App. 256:9–257:11. Accordingly, at the contempt hearing, OSC immediately moved to adjourn the hearing, making clear that, as a result of the court's comments, OSC was unable to present any witnesses in its case-in-chief, since it had no witnesses to testify. *Id*. at 322:47:12–14, R-App. 270:12–14 ("It is

[11]"There is another matter that I want to bring up. And I'm glad Mr. Niemierowicz is appearing here." 6/8/22 Hr'g Tr., R. 314:46:14–15, R-App. 250:14–15.

not that we would not wish to present evidence. It's, again, on the basis that we are not able to present evidence."); 322:4:19–5:23, R-App. 256:19–257:23.

The circuit court denied the continuance. *Id*. at 322:15:20–21, R-App. 267:20–21. In its subsequent Contempt Order, R. 327, R-App. 82, the circuit court sought to justify its denial of the continuance, arguing that "[n]othing in [the court's] comments [in the June 8, 2022 hearing] justified OSC's refusal to participate in the [June 10, 2022] hearing," *id*. at 327:18, R-App. 100. However, the circuit court's recitation of its comments from the hearing in its Contempt Order selectively omitted, some by ellipsis, the very words that Niemierowicz reacted to. *Compare id*. at 327:17, R-App. 99:

> I'm not suggesting there's a conflict of interest. … I do think a discussion may be warranted because Mr. Niemierowicz's personal interest might be to escape the scrutiny of the Court for deficiencies that appear now to be undisputed that he was acting at the direction of Mike Gableman . . .

with 6/8/22 Hr'g Tr., R. 314:47:4–48:1, R-App. 251:4–252:1 (omitted comments of the court at the hearing in the Contempt Order in italics):

> *Understanding that one remedial sanction can be incarceration, I wonder whether Mr. Niemierowicz has been apprised of the possibility that he may need to seek independent legal counsel*. . . . I'm not suggesting there's a conflict of interest. *I am saying that I also proceed very carefully and extremely cautiously when the question before the Court the contempt* (sic)*, and where one of the sanctions that could be imposed is confinement in the Dane County Jail. I just raise the issue because I don't believe anyone is deserving -- certainly not Mr. Niemierowicz's interest by having this occur to him spontaneously on Friday's hearing.*
> *I don't know that it's been discussed. It might not have occurred, but* I do think a discussion may be warranted because Mr. Niemierowicz's personal interests might be to escape the scrutiny of the Court for deficiencies that appear now to be undisputed that he was acting at the direction of Mike Gableman . . . .

Thus, the very comments by the circuit court—which the circuit court actually made, but refused to acknowledge in its Contempt Order—resulted in OSC's inability to present its sole witness in its case-in-chief, which the circuit court erroneously characterized as "OSC's refusal to participate in the June 10[, 2022] hearing[.]" *Id*. at 327:18, R-App. 100.

4. Finding of Contempt and Remedial Sanctions

After OSC had rested its case-in-chief without being able to present any evidence, AO, however, was permitted to present additional evidence, even though AO had not noticed any witnesses, rebuttal was not available, and AO had not moved to reopen its case in chief. *See e.g.,* 6/10/22 Hr'g Tr., R. 322:7:11–18, R-App. 259:11–18, *id*. 322:15:20–16:14, R-App. 267:20–268:13. This included AO calling Michael Gableman as a witness, 6/10/22 Hr'g Tr., R. 322:18:18–19, 29:13–14, 32:11–37:5, and moving to admit additional exhibits, *id*. at 322:38:4–7, 39:1–40:2, and the court itself *sua sponte* calling a witness, and conducting the direct examination of the witness, for AO, *id*. at 322:43:16–46:2. The circuit court then found OSC in contempt of court: "[b]ased on the lack of evidence here today, I conclude that [OSC] has not demonstrated that the disobedience of the court order was not intentional[.]" *Id*. at 322:51:3–8, R-App. 274:1–8. Finally, the court imposed sanctions of $2,000 per day, ordering not OSC, but non-party Gableman, to submit an affidavit detailing his efforts to purge OSC of contempt. Contempt Order, R. 327:25, R-App. 107.

5. Purge of Contempt

While the purge conditions were neither feasible nor reasonably related to the contempt, OSC made a good faith effort to comply with the circuit court's order, submitting an affidavit from Gableman, which detailed the steps he took to locate responsive documents and confirmed that all responsive records had already been produced. *See* Affidavit of Michael Gableman, R. 350 ("**Gableman Aff.**").

In good faith and to resolve any remaining dispute, Gableman submitted a supplemental affidavit addressing questions AO raised about his first affidavit, *see* Petitioner's Brief in Support of Motion for Determination of Contempt/Purge Status, R. 398:7–15, despite maintaining the original affidavit satisfied the purge conditions. Supplemental Affidavit of Michael Gableman, R. 409 ("**Gableman**

Supp. Aff."). The circuit court found the contempt purged by the first affidavit. Purge Order, R. 424:2–3, R-App. 207–208. Nevertheless, despite the new searches reaffirming that *all* responsive records had *already* been produced and no additional document being produced, the court ordered OSC to pay the sanctions from the date of its contempt order until the first affidavit was filed—totaling $24,000. *Id.*; *see also* Gableman Aff., R. 350.

D. Recusal Motion

Based on Judge Remington's actual and apparent bias against OSC in his conduct of this case, OSC moved for Judge Remington to recuse himself, Recusal Motion, R. 376, 377, which Judge Remington summarily and erroneously denied. Recusal Order, R. 379, R-App. 108.[12]

E. Finding of Sanctionable Conduct and Revocation of Pro Hac Vice Admissions

Finally, the circuit court issued its Recusal Supp., R. 423, R-App. 114, erroneously holding—without legal or factual justification and without notice, hearing, or opportunity to respond—that BLF Attorney's pro hac vice admissions should be revoked and that OSC Attorneys' conduct was sanctionable, principally for filing the Recusal Motion, Rs. 376, 377. Recusal Supp., R. 423:86–90, R-App. 200–204. However, the Recusal Motion was factually and legally justified and filed in good faith and there was no other sanctionable conduct. The facts and circumstances establishing the justification for the Recusal Motion, Rs. 376, 377, and demonstrating that none of OSC Attorneys engaged in sanctionable conduct are detailed below.

[12]The full facts and circumstances establishing the need for his recusal will be detailed below.

Argument

The circuit court committed numerous errors in ordering OSC to produce records and in imposing punitive damages under the Public Records Law, Mandamus Order, R. 165, R-App. 11, Order Denying Stay, R. 177, R-App. 64, Judgment, R. 497, R-App. 319; in finding OSC in contempt of the Mandamus Order and in imposing remedial sanctions, Contempt Order, R. 327, R-App. 82; Purge Order, R. 424, R-App. 205; in denying OSC's motion to continue the contempt hearing, 6/10/22 Hr'g Tr., R. 322:50:12–14, R-App. 273:12–14; in failing to recuse, Recusal Order, R. 379, R-App. 108; and in revoking BLF Attorneys' *pro hac vice* admissions and in finding OSC Attorneys' conduct sanctionable. Recusal Supp., R. 423:86–90, R-App. 200–204. Each will be dealt with in turn.

I. The circuit court erred in ordering OSC to produce investigation documents and in imposing punitive damages under Wisconsin's Public Records Law because OSC's records are exempt from disclosure.

This case presents exceptional circumstances where access to public records may be denied, as OSC's records were exempt under (**1**) the Assembly's constitutional authority to maintain confidentiality in its investigations, *see generally In re Falvey*, 7 Wis 630 (1859), (**2**) a statutory exception, Wis. Stat § 12.13(5)(a), (**3)** a common law exception, *State ex rel. Richards v. Foust,* 165 Wis. 2d 429, 477 N.W.2d 608 (1991), and (**4**) because the public interest in secrecy outweighed the interest in disclosure, *Kroeplin v. Wisc. Dept. of Natural Resources*, 2006 WI App 227, 297 Wis. 2d 254, 725 N.W.2d 286 (Ct. App. 2006).

A. Standard of Review

The "application of the Public Records Law to . . . undisputed facts" is a question of law requiring no deference to the circuit court's conclusions, *Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 825, 472 N.W.2d 579, 581 (Ct. App. 1991)

(citation omitted), reviewed de novo, *Friends of Frame Park, U.A. v. City of Waukesha*, 2020 WI App 61, ¶ 19, 394 Wis. 2d 387, 404, 950 N.W.2d 831, 839 (Ct. App. 2020) (overruled on other grounds) (citation omitted). Furthermore, this Court "is not bound by a trial court finding based on undisputed [] facts when the finding is essentially a conclusion of law." *Oshkosh Nw. Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985) (citation omitted).

B. Legal Standard

Wis. Stat. § 19.31 *et seq*. governs access to public records. While these statutes suggest the law be "construed in every instance with a presumption of . . . access," *id*. at § 19.31, this presumption is *not* absolute. Where statutory or common law principles prevent disclosure or the public policy favoring disclosure is outweighed by the interest favoring nondisclosure, "access may be denied." *See generally Hagen v. Board of Regents of the University of Wisconsin System*, 2018 WI App 43 ¶ 5, 383 Wis. 2d 567, 571, 916 N.W.2d 198, 200 (Ct. App. 2018).

C. The circuit court lacked jurisdiction.

The circuit court analyzed OSC's arguments regarding jurisdiction in two short sentences, Mandamus Order, R. 165:12, R-App. 23, thus refusing to properly consider separation of powers, which guarantees the Assembly the right to be free of judicial interference in its investigations.

Under the separation of powers doctrine, courts should not second guess the Assembly in determining how to conduct its investigation, including its confidential treatment of investigation documents. This doctrine "operates in a general way to confine legislative powers to the legislature." *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 536, 929 N.W.2d 209, 221 (2019) (citation omitted). "From the very nature of things, the judicial power

cannot . . . supervise the making of laws." *Id*. at 536–37 (citation omitted). Accordingly,

> [t]he judiciary may not interfere with the Legislature's execution of its constitutional duties. " . . . [C]ourt[s] will not, under separation of powers concepts and affording the comity and respect due a co-equal branch . . . , interfere with [legislative] conduct . . . ."

Id. at 537 (citation omitted); *see also State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 78, 798 N.W.2d 436, 440 (2011) ("absen[t] constitutional directives to the contrary," courts "will not intermeddle in what . . . [are] purely legislative concerns [or procedures].").

Thus, the Assembly has broad authority to conduct investigations in the manner it sees fit. Requiring OSC to produce investigatory documents superintends a legislative investigation, disrupting the separation of powers. Accordingly, the issue was not whether the Assembly/OSC violated the Public Records Law, but whether the Assembly/OSC's manner of conducting its investigation violated the Constitution. *State ex rel. LaFollette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684, 687 (1983). If the Assembly/OSC violates the Constitution, courts can intervene; if the Assembly/OSC acts within its constitutional role in investigating elections, courts stand aside. Courts lack all constitutional prerogative to evaluate the manner, process, or scope of the Assembly's investigation. Indeed, the Wisconsin Supreme Court confirmed the absence of such authority in this state's earliest days. *See In re Falvey*, 7 Wis. at 638.

There is no constitutional requirement to produce investigation documents. Absent a constitutional requirement, courts have no authority to act. *League of Women Voters*, 387 Wis. 2d at 537–38 ("[T]he judiciary lacks any jurisdiction to enjoin the legislative process," since "[t]he process by which laws are enacted . . . falls beyond the powers of judicial review[;]" the Assembly "makes its own rules,

prescribes its own procedure, subject only to the provisions of the constitution." (citations omitted)). This Court should find that the circuit court didn't have jurisdiction and vacate all orders.

D. OSC's records were exempt from disclosure.

1. The Assembly required OSC to keep Investigation records confidential, pursuant to its constitutional right to conduct investigations.

The circuit court found the Assembly didn't require OSC to keep its investigation records confidential, Mandamus Order, R. 165:15–21, R-App. 26–32, based on faulty premises and arguments OSC never made.

OSC never argued that the Assembly "suspended" the Public Records Law. *Contra* Mandamus Order, R. 165:16–17, R-App. 27–28; *see generally* Dismissal Motion, Rs. 98, 99; Reply in Support of OSC's Motion to Quash ("**Dismissal Reply**"), R. 150. OSC argued instead that **(1)** the Assembly determined, binding OSC, that the proper manner of investigation was to keep Investigation records confidential and (**2**) the Assembly has a constitutional right to conduct its investigations in any manner, process, and scope it chooses, which cannot be overridden by Public Records Law. Dismissal Motion, R. 99:8–13.

a. The Assembly required OSC keep records confidential.

The circuit court determined that the Assembly had not required OSC to maintain the confidentiality of its documents, because Resolution 15, R. 101:2:10–13, R-App. 275–277, "is plainly silent as to confidentiality," and the contract with OSC, which required confidentiality, Gableman Contract, R. 36:2, R-App. 303, was no longer in effect, because the First Amendment to Agreement, R. 108, R-App. 307 ("**First Amendment**"), which would have extended the term of the Gableman Contract indefinitely, was not validly executed. Mandamus Order, R. 165:17–21, R-App. 28–32.

While Resolution 15 didn't contain that language, it is not the sole authorizing document. Following Resolution 15's adoption, Ballot 21-03 was passed, which "authorize[d] the Speaker . . . to hire legal counsel and employ investigators to assist the [Committee] in investigating the administration of elections in Wisconsin[]" and gave Speaker Vos the authority to act on the Assembly's behalf. *Id*. at R. 102:2, R-App. 284 ("Speaker Vos, *on behalf of the Assembly*, shall approve . . . *contractual arrangements for hiring legal counsel* . . . ." (emphasis added)).[13]

After this ballot's adoption,[14] Speaker Vos, on the Assembly's behalf, entered into a contract "between The Wisconsin Assembly and Consultare," by and through its President, Gableman, to assist in the investigation. Gableman Contract, R. 36, R-App. 303. This contract required the contractor to:

> Keep all information/findings related to the services rendered under this agreement confidential . . . . The requirement for confidentiality . . . extends to any and all employees or agents of the Contractor.

Id. at R. 36:2, R-App. 303. This precluded Gableman and OSC from disclosing "all information/findings related to the [Investigation]," which necessarily includes via public records requests. *Id*.

Subsequently, the Assembly entered into the First Amendment, R. 108, R-App. 307, which established OSC. While the First Amendment "amend[ed] the IC Agreement[,]" 108:1:B, R-App. 308:B, it didn't supplant it, except "[i]n the event of any conflict between the terms and provisions . . . ." *Id.* at 108:1:4, R-App.

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[13]The agreements are "between The Wisconsin Assembly [] and Consultare[.]" Gableman Contract, R. 36:2, R-App. 303; *see generally Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263 (the Assembly can vest the Speaker with authority to contract on its behalf).

[14]In addition, Ballot 21-06 was passed which "authorize[d] the Speaker . . . to designate the legal counsel hired pursuant to [Ballot 21-03] . . . as special counsel to oversee an Office of Special Counsel." R. 103:2, R-App. 294.

308:4. Because no provision in the First Amendment conflicted with the confidentiality provision, the confidentiality provision continued. The Assembly also entered into a subsequent Second Amendment to Agreement, R. 176, R-App. 312 ("**Second Amendment**"), on March 8, 2022. Nothing therein altered the confidentiality provision.

The Gableman Contract with the Assembly continued via the various agreements until August 12, 2022, when the contract was terminated. Gableman Termination Letter, R. 419:3, R-App. 318.

b. OSC was at all times bound by the confidentiality provision.

The circuit court failed to properly consider the effect of the confidentiality clause in the original agreement, since it erroneously found OSC had not proven the existence of a valid contract because it thought that the First Amendment, which extended the term of the Gableman Contract indefinitely, was not validly accepted by Gableman. Mandamus Order, R. 165:19–20, R-App. 30–31.

c. The Gableman Contract's term was extended by the First Amendment which was validly accepted.

The circuit court was in error, however, because the First Amendment was validly accepted and the confidentiality provision of the Gableman Contract, therefore, continued to termination. This confidentiality provision governed public access to OSC documents, not the Public Records Law.

i. The First Amendment was validly accepted.

The circuit court held that OSC had failed to prove acceptance of the First Amendment. *Id*. at 165:21, R-App. 32. The question of the First Amendment started as a simple factual question: did Gableman have a continuing contract with the Assembly? 1/21/22 Hr'g Tr., R. 148:23:14–24:1 (AO questioning whether a contract was continuing between the Assembly and Gableman, as AO was concerned about who was responsible for OSC's documents.). In light of AO's

concern, the circuit court ordered OSC to produce the First Amendment, which OSC did. *Id*. at 148:27:14–20; First Amendment, R. 108, R-App. 307. The circuit court, however, held that the First Amendment was not legally accepted. Mandamus Order, R. 165:19–21, R-App. 30–32.

Nevertheless, the facts in the record demonstrate that there was a valid contract. First, both parties to the Agreement were parties to this case; neither alleged the relationship had ended until it was terminated by Speaker Vos. Gableman Termination Letter, R. 419:3, R-App. 318. Second, OSC affirmed that it had received the First Amendment directly from Gableman, who took it off his wall, where authorizing documents were hung, 3/8/22 Hr'g Tr., R. 182:23:7–15, and that Gableman advised OSC's counsel that he put the /s/ symbol on the signature line, *id.* at 182:22:22–23:15.

Third, while the circuit court's holding comes down to the fact that it "doubt[ed] any Wisconsin attorney would sign their name on an important contract by using a confusing symbol like "/s/," Mandamus Order, R. 165:20, R-App. 31, the court overlooked that Gableman routinely did so in other places in the record, *see* Produced Docs., Rs. 144:23–29, 144:33–36 (letters from OSC being signed /s/ by Gableman), and that Wisconsin law routinely allows the use of that symbol in place of a signature. *See, e.g.*, *Kocinski v. Home Ins. Co.*, 147 Wis. 2d 728, 735, 433 N.W.2d 654, 657 (Ct. App. 1988) ("'initials, thumbprint or an arbitrary code sign may . . . be used'" as signature "consistent with Wisconsin law" (quoting Restatement (Second) Contracts sec. 134 comment a)) (collecting cases); *Nelson v. Albrechtson*, 93 Wis. 2d 552, 560, 287 N.W.2d 811, 816 (1980) ("The word 'signed' . . . include[s] 'any handwritten signature or symbol on a conveyance intended by the person affixing or adopting the same to constitute an execution of the conveyance.'") (quoting Wis. Stat. § 706.01(4), now codified at § 706.01(10)); *id*. at 561 ("the signature merely symbolizes" assent to the contract); Wis. Stat.

§ 403.401(2) ("A signature may be made manually or by means of a device or machine and may be made by the use of any name, . . . a word, mark or symbol executed or adopted by a person with present intention to authenticate a writing."). Gableman denoted his acceptance with the symbol /s/.[15]

Fourth, the court stated, "The manner in which [] Gableman signs his name is well-represented in the record," Mandamus Order, R. 165:20–21, R-App. 31–32 (citing R. 144:47), ignoring that Gableman's signature varies on almost every document signed,[16] so a difference in signature alone cannot negate the acceptance of the contract. Finally, it has now been shown that the contractual relationship didn't end until August 12, 2022, Gableman Termination Letter, R. 419:3, R-App. 318, further proving that the circuit court erred in finding OSC had not proven a valid contract.

The First Amendment was validly accepted.

ii. Even if the First Amendment was not proven to be validly accepted, the parties' conduct proved the continuing contractual relationship.

The parties' continued conduct constituted a contract implied in fact, which arises from agreement circumstantially proved, requiring a "mutual meeting of minds" and "intention to contract[,]" and "is established by proof of circumstances from which intention is implied as a matter of fact." *Schaller v. Marine Nat. Bank of Neemah*, 131 Wis. 2d 389, 398, 388 N.W.2d 645, 649 (Ct. App. 1986) (citation omitted). Consent to the contract is "inferred as a fact . . . in light of the []

[15]Notwithstanding, a signature was not even required to establish the contract. *See Albright v. Stegeman Motor Car Co.*, 168 Wis. 557, 557, 170 N.W. 951, 952 (1919) ("It is quite fundamental that parties may become bound by the terms of a contract, even though they do not sign it, where their intention to do so is otherwise indicated."), *Consol. Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis. 2d 589, 599, 451 N.W.2d 456, 461 (Ct. App. 1989) ("A written agreement need not be signed by both parties to be effective." (citation omitted)).

[16] *See, e.g.* Rs. 36:5; 108:2; 144:49; 176:3; 350:5.

circumstances." *Dickman v. Vollmer*, 2007 WI App 141, ¶ 19, 303 Wis. 2d 241, 252–253, 736 N.W.2d 202, 208 (Ct. App. 2007).[17]

Neither the Assembly nor Gableman disputed the existence of a continuing contract, but explicitly argued *for* its continuing existence. Further, even outside of the litigation, the parties continued to act as though there were a continuing contract. At all times, Gableman operated OSC—employing investigators and staff, conducting the investigation, and preparing reports—until the Assembly terminated the agreement. The Assembly likewise acted as though there was a contract—continuing to fund OSC and authorizing subpoenas.

iii. The circuit court's own actions suggest continuation of the contract.

That there was a continuing contractual relationship is supported by the circuit court's own actions. If OSC's contract had lapsed, it would have therefore been unstaffed and—as the circuit court seems to acknowledge—a contractor should not be responsible for public records after a contract expires. *See* 1/21/22 Hr'g Tr., R. 148:26:1–5. Thus, absent a contract, who was the court ordering to produce documents on January 21, 2022? If it was OSC, staffed by Gableman, then the circuit court implicitly acknowledged the continuing contract. If it was to Gableman, as a former contractor, such action would have been inappropriate. If it was OSC, unstaffed because there was no longer a contract, who did he expect to comply?

The circuit court's own actions answer this question. It ordered "the [OSC] and, in particular, Mr. Gableman, [to] produce all the documents responsive to the requests[.]" 1/21/22 Hr'g Tr., R. 148:40:23–41:1. This implicitly acknowledges the

[17]The circuit court alleged that OSC "abandoned this argument." Mandamus Order, R. 165:21 n.11, R-App. 32 n.11. This is not the case. *See* Dismissal Reply, R. 150:2 n.3.

continuation of the contractual relationship, which is the only way Gableman could have been responsible for production.

In sum, there is only one logical conclusion: Consultare had an agreement with the Assembly from June 2021 to August 2022, Gableman Contract, R. 36, R-App. 302; Gableman Termination Letter, R. 419:3, R-App. 318, and no amendment altered the terms of the confidentiality provision. First Amendment, R. 108, R-App. 307; Second Amendment, R. 176, R-App. 312. Accordingly, OSC was at all times bound by the confidentiality provision.

d. The Assembly has broad authority to determine that investigation records be kept confidential.

The circuit court didn't reach OSC's constitutional arguments. Mandamus Order, R. 165:16, R-App. 27. However, with the contractual relationship and the confidentiality provision in effect throughout the relevant time frame, the only remaining question is whether that provision justified withholding requested records.

Given the Assembly's plenary authority with regard to legislative investigations, the confidentiality provision not only justifies, but mandates, withholding the requested records.

i. The Assembly has broad authority to conduct investigations and determine the manner thereof.

The Assembly has plenary authority to conduct investigations in furtherance of its legislative functions. Such investigations are essential to the lawmaking process, allowing the legislature to determine which laws to make or amend and to conduct its oversight duties. Without such authority, the legislature may not have all information necessary to make informed legislation. This plenary power to investigate includes the power to determine the manner, process, and scope of legislative investigations.

The Assembly has a "constitutional right" to conduct investigations. *In re Falvey,* 7 Wis. at 638; *see also* Wis. Const. Art. IV, Sec. 1 ("The legislative power shall be vested in a senate and assembly."); *State ex rel. McCormack v. Foley,* 18 Wis. 2d 274, 277, 118 N.W.2d 211, 213 (Wis. 1962) ("The framers of the Wisconsin Constitution vested the legislative power of the state in a senate and assembly . . . subject only to the limitation and restraints imposed by the Wisconsin Constitution and the Constitution and laws of the United States. This Court has repeatedly held that the power of the state legislature, unlike that of the federal congress, is plenary . . . ."); *Town of Beloit v. Cty. of Rock,* 2003 WI 8, 259 Wis. 2d 37, 53, 657 N.W.2d 344, 350 (2003) ("The Legislature has plenary power to act except where forbidden by the Wisconsin Constitution." (citation omitted)).

Likewise, courts have made clear that:

> The legislature has very broad discretion[] . . . to investigate any subject respecting which it may desire information in aid of the proper discharge of its [law-making] function . . . , or perform any other act delegated to it . . . and to proceed, with that end in view, by a duly authorized committee of one or both branches of the Legislature[.]

Goldman v. Olson, 286 F. Supp. 35, 43 (W. D. Wis 1968) (internal quotation marks and citation omitted). The court further noted that the Supreme Court has held this "broad" legislative investigation power is:

> 'inherent in the legislative process . . . [,] encompass[ing] inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.' . . . [T]he investigatory power of Congress [is] equally applicable to state legislatures.

Id. (quoting *Watkins v. United States,* 354 U.S. 178, 187 (1957) and citing *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544–545 (1963)).

No provision of Wisconsin's Constitution limits the authority of the Assembly to conduct investigations as it sees fit or requires disclosure of investigatory documents.

The only case in Wisconsin discussing the constitutional limitations of legislative investigations is *Goldman*, which recognized *only* two limitations upon the investigatory power of the Assembly: due process and the First Amendment. *Id*. at 43. Neither due process nor the First Amendment is at issue in this case. As a result:

> The policy, the expediency of exercising the power, and the manner of conducting the investigation, rests . . . entirely in the sound discretion of the legislature. For if the legislature have the power to investigate at all, it has the power of choosing how the investigation shall be had; whether by a committee of one house, or by a committee of each house, acting separately, or by committees acting jointly.

In re Falvey, 7 Wis. at 638 (also noting that the legislature may investigate *"in any other manner which to it might seem most convenient and proper*." (emphasis added)).

The circuit court sidesteps the argument. Mandamus Order, R. 165:16–17, R-App. 27–28. Instead of addressing whether keeping records confidential is a constitutionally permitted manner to conduct the investigation, the circuit court erroneously states that the legislature is suspending a statute, "then giving away that right in a contract." Mandamus Order, R. 165:15, R-App. 26.

But OSC never argued that the Assembly could suspend statutes. *See* Dismissal Motion, Rs. 98, 99. Instead, OSC argued that legislative power has been vested into the Wisconsin Assembly by Wis. Const. Art. IV, Sec. 1 and, inherent in that power, is the power to conduct investigations. *See Gibson*, 372 U.S. at 545 (quoting *Watkins*, 354 U.S. at 187). Accordingly, in this unique situation *involving a legislative investigation*, the Assembly is not bound by the Public Records Law, as legislative investigations are limited only by the Assembly itself and by constitutional limitations.[18]

[18]This ensures there is no premature disclosure of information, so the Assembly has all the necessary information to assist in the power to make and unmake laws.

Accordingly, so long as the investigation is in furtherance of a valid legislative purpose and the action taken is not specifically proscribed by the Constitution, the confidentiality provision of the Assembly was valid and enforceable.

ii. The Investigation is in furtherance of a valid legislative purpose.

As shown above, the Assembly has plenary power in investigations related to a legislative purpose with the only limits being constitutional ones. *See, e.g., Watkins,* 354 U.S. at 197 ("The power [to investigate] is inherent in the legislative process."); *Goldman,* 286 F. Supp. at 43.

Determining what laws to make is at the core of the legislative function. Further, "[w]ithout information, [the Assembly] would be shooting in the dark, unable to legislate 'wisely or effectively.'" *Trump v. Mazars, USA, LLP,* 140 S. Ct. 2019, 2031 (2020) (citation omitted). So while the investigation must serve a "valid legislative purpose," such legislative purpose must simply "concern a subject *on which legislation could be had." Id*. (emphasis added) (citations omitted).

Laws relating to elections are clearly within the purview of a "subject on which legislation could be had." U.S. Const. Art. 1, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." (emphasis added)); *see also* U.S. Const. Art. 2, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . " to vote for President and Vice President.). Further, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X; *see also* 1/21/22 Hr'g Tr., R. 148:48:7–12 (circuit court quoting Speaker Vos stating "he's waiting for the

investigation to be completed so the . . . assembly, can make some decisions on what bills to introduce.").

Thus, laws and legislation regulating elections are within the legislative powers of the States. The authorizing resolution provides the purpose of the Investigation is to "investigate the administration of elections in Wisconsin," Resolution 15, R. 101:2, R-App. 277, which is unequivocally a concern "on which legislation could be had." *Mazars*, *USA*, 140 S. Ct. at 2033. Thus, this Investigation into election related matters is clearly a valid legislative purpose.

iii. The manner of the Investigation was proper.

Given the broad and plenary authority the Assembly has to investigate and to the determine the process, manner, and scope of the investigation, relevant statutes and rules cannot be seen as limits to that authority, only the Constitution.

As Courts have made clear, "the manner of conducting the investigation, rests . . . entirely in the sound discretion of the legislature." *In re Falvey,* 7 Wis. at 638. "For if the legislature have the power to investigate at all, it has the power of choosing how the investigation shall be had[.]" *Id*. Accordingly, it is within the constitutional powers of the Assembly to determine how an investigation will be conducted.

Here, the Assembly determined, as is its prerogative and right, that the investigation would be conducted via special counsel and that all documents and records should be kept confidential. There is no constitutional provision that requires OSC to produce records from the Investigation and the Public Records Law is a statute, not a constitutional provision.

Accordingly, OSC was bound to comply with the Assembly's confidentiality requirement and the withholding of records was proper.

2. Common law exempts the Investigation records from disclosure.

The circuit court found that the common law investigatory exception didn't provide a basis for withholding records. Mandamus Order, R. 165:26–28, R-App. 37–39. This was in error as it is settled common law that investigative files are immune from disclosure.

Prosecutorial Investigations. Per se immunity of a prosecutor's investigation materials from disclosure is well known, as are the obvious public policy reasons for such prophylactic protections. *See Foust,* 165 Wis. 2d at 435 ("In addition to the common law, public policy grounds exist to keep the prosecutorial file closed. These public policy grounds are obviously a part of the reason for the common law exception."). In fact, while an explanation for denying a request is recommended, the exemption is so obvious and compelling that a prosecutor has no obligation even to respond to an open records request to review an investigation file, much less to provide a detailed explanation or produce its contents. *Id*. at 437.

Non-Prosecutorial Investigations. The investigation exemption applies with equal force where the investigation is conducted by non-prosecutorial agencies like OSC. In 61 Op.Atty.Gen. 12 (1972),[19] the Attorney General stated that "[w]here the documents involve a potential criminal prosecution, or an existing investigation or pending licensing or disciplinary proceeding, there may be sufficient reasons to withhold inspection. The determination is for the custodian or his deputy . . . ." *Id.* The disclosure exemption for fire marshal investigations is less well known than for prosecutorial investigations, but is just as well established, and was relied on by the *Foust* court in confirming the prosecutorial exemption:

[19]Available at https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/1972/Volume%2061_1972.pdf.

> [I]nvestigations [by a fire marshall] themselves are not to be made matters of record. It is merely his determinations based upon such investigations that are to be made matters of record. Such determinations are in the nature of statistics, or at least they may be compiled as statistics, and such statistics, by the mandate of the statute, become records and are to be open to public inspection.

165 Wis. 2d at 435–436; *see also Wisconsin Fam. Counseling Servs., Inc. v. State*, 95 Wis. 2d 670, 291 N.W.2d 631 (Ct. App. 1980) (which concerned a non-prosecutorial investigatory matter and was relied upon by *Foust*, 165 Wis. 2d. at 434.).

Election Investigations. While an exemption from public disclosure for legislative investigation documents has obviously not been previously considered, the reasons for such immunity are even more compelling than for investigation of an individual suspected of a crime. Nothing is more fundamental to ordered society than lawful elections deserving of public trust and confidence. OSC's task was to investigate the administration of all statewide elections focusing on elections since January 1, 2019, including the November 3, 2020, election. Resolution 15, R. 101:2:10–13, R-App. 277:10–13. The Assembly's authorizing resolution and ballots make clear that investigating integrity and possible criminal violations of election law were critical to its task. *See generally id*. at R. 101; Ballot 21-03, R. 102, R-App. 282; Ballot 21-06, R. 103, R-App. 292.

As its December 4 email indicated, OSC claimed exemption only during the pendency of the investigation, advising it was withholding "[s]ome documents," only "until the conclusion of our investigation." Mandamus Order, R. 165:4, R-App. 15. Disclosure following completion of an investigation is also perfectly consistent with established law. *See, e.g. Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 438, 279 N.W.2d 179, 189 (1979) (the overriding public interest in preserving secrecy is no longer "discernible when the executive act of arrest has been completed"); *Foust*, 165 Wis. 2d at 435–436 ("The investigations themselves are

not to be made matters of record. It is merely his determinations based upon such investigations that are to be made matters of record." (citation omitted)).

This Court should find that the circuit court erred in finding that OSC's records were not exempt from disclosure under the common law investigation exemption and hold that, under the common law investigation exception, OSC's records are exempted from disclosure.

3. Statutory exemption permits withholding of investigatory records.

Wis. Stat. § 19.36(1) generally exempts from disclosure records "exempted . . . or authorized to be exempted from disclosure by state law[.]" The circuit court erred in failing to recognize the exemption in Wis. Stat. § 12.13(5)(a) ("**No-Disclosure Law**") applied here. Mandamus Order R. 165:22–25, R-App. 33–36.

Wisconsin courts begin with the ordinary meaning of the statute's text, taking into account its context and avoiding absurdity. *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (2004). If that yields a plain meaning, that is what courts apply. *Id.*

The plain meaning of the No-Disclosure Law prevents the unauthorized release of investigatory information:

> [N]o investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the commission may disclose information related to an investigation or prosecution under chs. 5 to 10 or 12 [(Wisconsin's election statutes)] . . . or provide access to any record of the investigator, prosecutor, or the commission that is not subject to access under s. 5.05 (5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the commission prior to presenting the information or record in a court of law.

Wis. Stat. § 12.13(5)(a).

This statute's plain meaning prevents OSC from disclosing information related to the Investigation since its commission was to investigate the election,

Gableman was an "investigator," and all OSC members were "employee[s] of an investigator."

The circuit court, however, erroneously held that "prosecutor" and "investigator," as used in this statute, "refer exclusively to the prosecutors and investigators" of the Wisconsin Elections Commission ("**WEC**"). Mandamus Order, 165:25, R-App. 36 (quoting Att'y Gen. Op. OAG-7-09, ¶ 33 ("**OAG**")[20]). For six reasons, this Court should find that the No-Disclosure Law applies to investigators and prosecutors outside of WEC.

a. The punctuation of the statute demonstrates that the non-disclosure requirement applies to all investigators, not just those employed by WEC.

First, plain statutory construction makes clear that this section applies to more than WEC—it also applies to (1) investigators and their employees and (2) prosecutors and their employees (collectively, "**Investigators and Prosecutors**"). The OAG's conclusion that Wis. Stat. § 12.13(5)(a) applies only to WEC and its agents and retainees, OAG ¶ 2, (collectively, "**WEC Agents**"), is contrary to the grammatical structure of the statute. Because Gableman, and the OSC he directed, was hired as an "investigator" into any irregularities or illegalities connected to an election, they were required to abide by Wis. Stat. § 12.13(5)(a).

"[T]he meaning of a statute will typically heed the commands of its punctuation[.]" *State v. Holcomb*, 2016 WI App 70, ¶ 12, 371 Wis. 2d 647, 653, 886 N.W.2d 100, 102 (Ct. App. 2016) (citation omitted). The No-Disclosure Law states that "no investigator, prosecutor, employee of an investigator or prosecutor, *or member or* employee of the commission may disclose [specified items]." Wis. Stat. § 12.13(5)(a) (emphasis added). The question of which words are modified by "of the commission" is simple via drafting leaving no question of intent. Had the

[20] ("Available at https://docs.legis.wisconsin.gov/misc/oag/recent/oag7_09.

legislature intended for the phrase to modify every listed item, the provision would have instead said: "investigator, prosecutor, employee of an investigator or prosecutor, member, or employee, of the commission," which would have been clear, creating (a) a list of actors and (b) a comma-offset clause modifying each item in the list, using the "last-antecedent" rule of construction to make that intent clear.[21] Wisconsin has long embraced this well-known grammatical rule[22] and applies it strongly. *See, e.g.*, *Nat'l Amusement Co. v. Wisconsin Dep't of Tax'n*, 41 Wis. 2d 261, 268–69, 163 N.W.2d 625 (1969) (analyzing a statute concerning "food products . . . sold by restaurants, hotels, cafes, bars, caterers, lunch counters, wagons, and other establishments engaged in the business of preparing food . . . ," the Court noted bluntly, "The placing of a comma after 'wagons' . . . indicates that the clause ' . . . engaged in the business of preparing food . . . ' modifies only 'other establishments.' *This seems to be the only logical interpretation of the statutory language*." (emphasis added)). This rule applies here where the last antecedent (itself a compound antecedent, "member or employee") is not followed by another comma before the modifier ("of the commission"), and is therefore the only item modified thereby. As in *Nat'l Amusement Co.*, this interpretation is the "*only logical interpretation* of the statutory language." *Id.* (emphasis added).

There is no ambiguity in the statute and, as discussed below, the opposite of an indication that the legislature intended any other construction. *See In re*

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[21] "One of the methods by which a writer indicates whether a modifier that follows a list . . . is intended to modify the entire list, or only the immediate antecedent, is by . . . whether the list is separated from the subsequent modifier by a comma. When there is no comma . . . the subsequent modifier is ordinarily understood to apply only to its last antecedent. When a comma is included . . . the modifier is generally understood to apply to the entire series." *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013) (citing Sir Ernest Gowers, Fowler's Modern English Usage 587–88 (2d ed. 1965); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999)).

[22] Since at least 1939. *See Serv. Inv. Co. v. Dorst*, 232 Wis. 574, 288 N.W. 169, 170 (1939).

Bowler's Tr., 56 Wis. 2d 171, 179, 201 N.W.2d 573, 577 (1972). The analysis could therefore end here, since a construction that is *typically* highly persuasive (such as an Attorney General's opinion) "is only of significance where there is an ambiguity in the statute. It cannot overcome the plain wording of a statute where there is no ambiguity."[23] *Nat'l Amusement Co.*, 41 Wis. 2d at 274 (citation omitted). But, as follows, there are additional reasons to find that the statute must be so construed.

b. The statute's second reference to the parties to whom it applies means that the non-disclosure requirement applies to all "investigators," not just those employed by WEC.

Although required by precedent, one need not employ the "last-antecedent" rule to arrive at the proper construction: the statute's second reference to the parties to whom it applies further reveals the Investigators and Prosecutors/WEC Agent distinction. This part of the No-Disclosure Law notes that the parties mentioned therein may not "provide access to any record of *the investigator, prosecutor, or the commission*." Wis. Stat. § 12.13(5)(a) (emphasis added). *If* "the investigator" or "the . . . prosecutor" mentioned in the statute were intended to refer *only* to an investigator or prosecutor employed or retained by WEC, the disjunction between these two parties and "the commission" would be inexplicable, rendering the "records" theoretically belonging to one single party into "records" belonging to multiple parties. Thus, the only conceivable reading is that "the investigator" or "the . . . prosecutor" means *any* investigator or prosecutor.

[23] Importantly, this quotation demonstrates that varying interpretations of a given statute *does not* mean that the statute is ambiguous. *Contra* Mandamus Order, R. 165:23, R-App. 34 (stating that the fact that OSC disputed the OAG meant OSC's position was that the statute "is ambiguous . . . .").

c. The syntax of the statute demonstrates that Investigators and Prosecutors are not modified by "of the commission."

Third, the statute's use of "or" is yet *another* clear, plain-wording indication of the legislature's intent. Looking again at the subject list, "no investigator, prosecutor, employee of an investigator or prosecutor, *or member or* employee of the commission may disclose [specified items]" Wis. Stat. § 12.13(5)(a) (emphasis added), we see that omission of the first "or" after the final comma would render: "no investigator, prosecutor, employee of an investigator or prosecutor, member or employee of the commission may disclose [specified items]." *This* could arguably be read to indicate that the modifier applies to all antecedents: the force of the last-antecedent rule would be weakened where the penultimate term in a list unbroken by an "or" (thus suggesting no categorical difference in the items listed), clearly requires a modifier (without which we would be left to wonder, "member of *what*?"). Such a conclusion would be bolstered *if* a comma followed "member," thus indicating a complete list that requires at least one antecedent prior to the final comma to nonetheless be modified ("member of *what*?") and so requiring a reading that sets aside the "last-antecedent" rule.

The legislature did neither of these things. Both of these omissions further confirm that Investigators and Prosecutors are *not* modified by "of the commission."

d. When it comes to legislative intent, the OAG strains at a gnat but swallows a camel.

A foundational principle of statutory construction, that statutes must be construed to give effect to their textually manifest purpose, *Garcia v. Mazda Motor of Am. Inc.*, 2004 WI 93, ¶ 15, 273 Wis. 2d 612, 623, 682 N.W.2d 365, 370 (2004), also requires this conclusion. It is clear on its face that the purpose of the No-Disclosure Law is to exempt election investigation records from the public records law. This ensures confidentiality, which protects (for example) sensitive

voting data and leads regarding potential election malfeasance. This is why the main thrust of the statute is to establish that "*no [specified party] may disclose* [such] information . . . ." Wis. Stat. §12.13(5)(a). It must be construed in a manner that best gives effect to this intent.

This defeats the OAG's characterization. *See* OAG ¶ 25 (charactering intent as accessibility of investigatory documents). While there are exceptions to the No-Disclosure Law, they are just that: exceptions. The main thrust of legislative *intent* is shown in the main thrust of the *statute*: prohibiting such access. Thus, the OAG occludes the main purpose by construing it in a way that gives more effect to its *exceptions'* minor purpose than its main purpose. The OAG thus strains at a gnat (the exceptions purportedly failing, under OSC's construction, in certain instances) while swallowing a camel (defeat of the *main* intent, protecting certain information whose sensitive nature does not change based on which investigative entity's hands it is in).

e. OSC's reading also avoids surplusage.

Fifth, the circuit court's construction defines multiple words in the statute to mean the same thing, which offends Wisconsin's rule that statutes are to be interpreted to avoid surplusage. *Klemm v. Am. Transmission Co.*, 2011 WI 37, ¶ 18, 333 Wis. 2d 580, 589, 798 N.W.2d 223, 228 (2011). In construing the statute to apply only to WEC Agents, the circuit court rendered nine words in the statute meaningless ("investigator, prosecutor, employee of an investigator or prosecutor, or"). If that construction were correct, there would have been no need for the legislature to distinguish "investigators" or "employees of investigators," for example, from a "member or employee of the Commission." And near the end of Wis. Stat. § 12.13(5)(a), "employee or agent of the prosecutor or investigator" would again be superfluous. OSC's reading gives no effect to these words and phrases.

By finding Wis. Stat. § 12.13(5)(a) applies only to WEC Agents, the circuit court assumed that the legislature meant to express the *same* concept four distinct, superfluous times in three parts of the statute. *See* Wis. Stat. § 12.13(5)(a) (two times), (b) (once), and (b)(3) (once). Wisconsin law does not permit such a construction.

f. The age of the OAG mitigates its persuasiveness.

Sixth, OAG was drafted over a decade in advance of OSC's creation. Its significance should be mitigated as there was no consideration or contemplation of OSC when the opinion was drafted. The circuit court rejected this notion, stating, "If OSC could explain why the [OAG] should have accounted for OSC, this argument might have some merit." Mandamus Order, R. 165:22, R-App. 33. But the persuasive value of an Attorney General opinion is dissolved if it fails to account for important factors, without regard to whether those factors "should have" been "accounted for." In *State v. Chvala*, in construing a statute regarding the granting of continuances, the court concluded that, although an Attorney General opinion gave a reasonable construction, it would impermissibly interfere with the court's "constitutional exercise of its authority" and violate separation of powers. 2003 WI App 257, ¶¶ 20, 22, 268 Wis. 2d 451, 463–465, 673 N.W.2d 401, 406–407 (Ct. App. 2003). The court rejected the AG's view, noting that the opinion "*d[id] not address the question* whether that construction of the statute violates the doctrine of separation of powers," *id.* at 466 n.7 (emphasis added), with no discussion of whether it "should have accounted for" a possible separation of powers violation, *see* Mandamus Order, R. 165:22, R-App. 33—a much better known potentiality than one contemplating an entity that didn't even exist at the time.

In addition, the present circumstances demonstrate that the OAG's construction must be rejected because it fails to account for the statutory, common-

law, and public policy considerations discussed herein and highlighted only now, over a decade after the opinion was written. *See Green Bay Educ. Ass'n. v. State, Dept. of Public Instruction*, 154 Wis. 2d 655, 664, 453 N.W.2d 915, 918–919 (Ct. App. 1990) (finding legislative changes occurring in the eleven years since the Attorney General opinions were issued "significantly diminish[ed] any persuasive authority that such opinions may have had.").

This Court should find that the circuit court erred in finding that the No-Disclosure Law didn't exempt the documents at issue here from disclosure and hold that, under the No-Disclosure Law, OSC's documents were exempted from disclosure.

4. The public interest requires confidentiality of election investigation information.

Because of the Assembly's plenary authority and the statutory and common law exceptions, the Court need not go further. The requirement that a custodian balance the public interest in disclosure against the interest in confidentiality (and state with specificity its reasoning for withholding documents), *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 156–160, 469 N.W.2d 638, 643–645 (1991), does not apply to "records whose confidentiality is expressly guaranteed by statute[,]" *state ex rel. Blum v. Bd. of Educ., Sch. Dist. of Johnson Creek*, 209 Wis. 2d 377, 386, 565 N.W.2d 140, 144 (Ct. App. 1997). Likewise, it is inapplicable where there is a "common law exception to the open records law . . . . [T]he courts have already determined that in those situations, the harm to the public interest outweighs the public benefit . . . ." *George v. Knick*, 188 Wis. 2d 594, 598, 525 N.W.2d 143, 145 (Ct. App. 1994); *see also* Wis. Judicial Benchbook, Vol. II: CV 28, § 8.G.3 ("If statutory exception to disclosure claimed, balancing test inapplicable"), 4 ("If common-law exception to disclosure is claimed, balancing test inapplicable"). Nonetheless, the presumption of access here

is also "outweighed by an even stronger public interest favoring nondisclosure." *Kroeplin*, 297 Wis. 2d at 280.

The two-step review asks "whether the stated reasons are sufficient to permit withholding" and "whether the custodian's denial of access was made with the requisite specificity." *Id*. at 280–281 (citations omitted).

a. Protection of investigation outweighs disclosure.

The common law exception discussed above arose from public policy:

> [Investigatory information is] to be protected if continuing cooperation of the populace in criminal investigations is to be expected. In addition to the common law, public policy grounds exist to keep the prosecutorial file closed. These public policy grounds are obviously a part of the reason for the common law exception.

Foust, 165 Wis. 2d at 435. This exception applies beyond prosecutorial files: *Foust* found it was established in part by *Wis. Fam. Counseling Servs.*, *id*. at 434, which concerned a non-prosecutorial investigatory matter and which found that secrecy was justified in the interests of, *inter alia*, keeping potential targets from fleeing, "preventing . . . thwarting the inquiry . . . or secreting evidence," and "preventing testimony which may be mistaken or untrue or irrelevant from becoming public," *Wis. Fam. Counseling Servs*, 95 Wis. 2d at 674, 677.

This final factor is noteworthy because it concerns the potential for confusion via release of information whose significance is unknown to the recipient. In various legal contexts, courts often hold such non-explicit dangers of releasing strategic information as a basis for exempting records, or knowledge of documents' existence, from disclosure. *See, e.g.*, *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) (attorney not required to disclose whether she had knowledge of certain documents because that "would indicate to her opponent that she had reviewed the document and that, since it was important enough to remember, she may be relying on it in preparing her client's case."). Concerns of

this nature recognize that seemingly "random" documents are only "random" to certain viewers. Thus, even if, *arguendo*, the circuit court properly reached in-camera review, it should have granted OSC's request for ex-parte argument on the documents, as it is *only* the custodian who understands the documents, not a viewer who may consider the documents random and insignificant (even a judge). Motion of OSC for Order Permitting *Ex Parte* Argument Re Documents Submitted for Individualized *in Camera* Review, Rs. 152, 153:5–7.

In sum, even if the common law exception for investigations didn't apply here, the public policy of protecting strategy and the integrity of an investigation though completion, without compromise or public confusion via premature disclosure, outweighs the public policy of immediate disclosure. The investigation was commissioned with the potential to have state-wide implications on how elections are conducted and concerned potentially criminal activity in a sacred institution. The public's interest in assuring such investigations are not compromised, particularly when investigators have not had sufficient time to develop facts, leads, or strategy, is offended by disclosure, which is antithetical to the intent of the public records statute.

b. OSC's denial was made with the specificity required.

The requirement that a custodian state with specificity its reasoning for withholding documents, *Mayfair*,162 Wis. 2d 142 at 160, which the circuit court found that OSC neglected, Mandamus Order, R. 165:14, R-App. 25, applies only if the balancing test itself applies: "only when the basis for a denial of access is grounded upon public policy considerations." *Blum*, 209 Wis. 2d at 387. So it is inapplicable when "confidentiality is . . . guaranteed by statute," *id.* at 386; and where there is a "common law right to not disclose" records, *Foust*, 165 Wis. 2d at 437 (holding that under common law exception to disclosure, there was "no

obligation to respond to" the public records request at all[24]), as the circuit court failed to recognize despite OSC noting it. *Compare* Mandamus Order, R. 165:14, R-App. 25 *with* Dismissal Reply, R. 150:14, 14 n.11 (citing *Foust*, 165 Wis. 2d at 437).

In any event, the circuit court applied the wrong standard in determining whether OSC complied with the specificity requirement, providing sufficient reasons for its nondisclosure. When a records custodian denies a request for public policy reasons, "he must state the specific policy reasons . . . ." *Mayfair*, 162 Wis. 2d at 157 (citation omitted). While OSC listed two specific policy reasons, integrity of an "investigation" and, even more specifically, "strategic information," Mandamus Order, R. 165:4, R-App. 15, the circuit court held that these *didn't* constitute "specific reasons," stating that OSC's explanation didn't (a) "explain why 'strategic information' is a specific reason," (b) "restrain[] [OSC] from arbitrarily denying access," or (c) "enable the requester to challenge the withholding and the courts to understand that challenge." *Id.* at 165:13–14, R-App. 24–25 (citations omitted).

i. The circuit court didn't apply correct legal standard.

In finding OSC "d[id] not explain" how its reasoning was "a specific reason," Mandamus Order, R. 165:13, R-App. 24, the circuit court redefined the applicable legal standard. The specificity requirement does not prescribe an "explanation" of the "reason," but only a reason. The circuit court's citation for

[24]*A fortiori*, a custodian would not be obligated to give a specific reason *in* response. This accords with the rationale of the specificity rule, which prevents "arbitrar[y] den[ial]" without balancing the public interest. *Mayfair*, 162 Wis. 2d at 160. If a common-law exception applies, the judiciary "has already done so. Unlike the facts giving rise to a public-policy-based denial of access, which may indeed be unknown to the requester, the existence of a [common-law exception] exempting certain kinds of information from disclosure is not uniquely within the custodian's knowledge." *Blum*, 209 Wis. 2d at 387.

this new "explanation" requirement, *id*. (*citing Mayfair*, 162 Wis. 2d at 160), nowhere lists it. Instead, noting that while "public interest," a legal conclusion, is not a sufficient reason in itself, "personal and economic harm" *is* sufficient, it concludes that the reason for withholding given by the *Mayfair* defendant, a pledge of confidentiality, *was* sufficient because it "provided Mayfair with sufficient notice . . . ." *Mayfair*, 162 Wis. 2d at 158–61 (citations omitted). So *Mayfair didn't* hold that a specific reason for withholding must be further "explained,"[25] only that the reason for withholding be "sufficient" to prevent arbitrary denial and to provide a basis for judicial review. *Id.* at 160–63. So a "custodian is not required to provide a detailed analysis." *J./Sentinel, Inc. v. Aagerup*, 145 Wis. 2d 818, 823, 429 N.W.2d 772, 774 (Ct. App. 1988). Nor does the fact that a denial statement is succinct render it non-specific: in *Aagerup*, the court held that in stating that requested records were "part of a law enforcement detection effort[,]" the custodian had claimed a specific "public policy reason for confidentiality: crime detection," which was "succinct but . . . adequate . . . ." *Id.* at 823–824. Indeed, *Aagerup* noted that inherent *within* this reason were the fact that disclosed "information might reveal an informer's identity, or take away a necessary element of surprise from the police, or enable a perpetrator to obscure evidence or hide identity." *Id.* at 826 (citation omitted). Of course, the greater the detail in the "specific" explanation, the greater the risk of tipping off the nature and targets. So hyperspecificity is not required.

Because OSC pointed to *specific* reasons for confidentially—that the records contained "strategic information to [OSC's] investigation[,]" Mandamus Order, R. 165:4, R-App. 15—public policy reasons reflected in constitutional, statutory, and common law, its denial gave sufficient notice for judicial review and

[25]In the same way that premature disclosure of investigation documents can compromise an investigation, "explanation" can tip off the nature and targets of the investigation.

was not arbitrary—complying with the specificity requirement. In applying a heavier burden, the circuit court erred.

ii. The circuit court didn't analyze the reason given for nondisclosure.

The circuit court additionally failed to analyze the full reason OSC gave. OSC specifically stated (1) that the "*documents* [] *contain* strategic *information*," and (2) that such information was strategic "*to* [*the*] *investigation.*" Mandamus Order, R. 165:4, R-App. 15. The circuit court claimed the cited "strategy" could simply be "concealing information." *Id*. at 165:14, R-App. 25. But this suggests OSC's reason for denial was, "it is strategic to deny this request," while OSC's actual words cannot be interpreted so broadly: OSC stated that the *documents themselves* contained strategic "information," that is, information that would reveal OSC's strategy for *conducting the ongoing investigation*. Providing a factual statement about the documents is a far cry from the subjective claim of "strategy" that the circuit court analyzed. Thus, while simply stating "it is strategic to withhold these documents," could indeed be a euphemistic way of saying, "We have a strategy of not going through the trouble," that is not relevant: the circuit court erroneously did not take into account the context appended to the word "strategic."

Furthermore, the circuit court did not consider that OSC further specified its denial with the words "to our investigation."[26] *Id*. at 165:4, R-App. 15. This further specified the reason for withholding: not only did the documents "contain strategic information," but information strategic *to an investigation*. Here it is important to note that

[26] *Compare* Mandamus Order, R. 165:4, R-App. 15 (*initially* recognizing that OSC said records would "continue to be hel[d] until the conclusion *of our investigation*." (emphasis added)) *with id.* at 165:13 n.7, R-App. 24 n.7 (eliding investigation rationale in analysis: "'The Court does not address OSC's second reason, that records 'will continue to be hel[d.]'").

> [w]here the public policy reasons behind the stated reason for the denial are obvious and well-known, as in this case, [Wisconsin courts] will not refuse to consider the merits of the denial. . . . [H]ypothesiz[ing] reasons why disclosure would be harmful to the public interest . . . is unnecessary in a case such as this where the arguments supporting the reason for the denial are obvious to all.

Mayfair, 162 Wis. 2d at 163; *see also Aagerup*, 145 Wis. 2d at 824 (rejecting the notion that documents cannot be *strategic* if they do not explicitly describe a "strategy.").

In *Mayfair*, the obvious policy that needed not be stated was the "well-known public interest in effective law enforcement," 162 Wis. 2d at 161; here, the policy of maintaining the confidentiality of investigation records is equally well-established, *supra* Part I.D.4.[27] Accordingly, OSC was not legally required to "explain" its denial beyond the legally sufficient reasons it specifically stated, and the unstated obvious public policy regarding investigatory documents.

As a result, this Court should vacate the circuit court's Mandamus Order, R. 165, R-App. 11, including the punitive damage award, since none of these arguments were arbitrary or capricious, and the Order Denying Stay, R. 177, R-App. 64, Judgment, R. 497, R-App. 319, Contempt Order, R. 327, R-App. 82, and Purge Order, R. 424:3, R-App. 208 ($24,000 sanction).

II. The circuit court erred in finding OSC in contempt and in imposing remedial sanctions.

The circuit court erroneously found OSC in contempt despite all deficiencies being remedied and OSC being unable to present a defense, which would have shown that the violation was neither intentional, nor continuing, and in imposing remedial sanctions. Contempt Order, R. 327, R-App. 82; *see generally Christensen v. Sullivan*, 2009 WI 87, 320 Wis. 2d 76; 768 N.W.2d 798 (2009).[28]

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[27] And even if it were not as well-established as it is, this would go to the sufficiency of the denial, rather than its specificity. As described above, OSC's reason *was* "specific."

[28] For the same reasons, the circuit court erred in affirming the prior finding of contempt and imposing $24,000 in sanctions in its final order. Purge Order, R. 424, R-App. 208.

A. Standard of Review

A trial court's finding of contempt will be reversed "in a plain instance of mistake or abuse of discretion," while its factual findings will be overturned if they are "clearly erroneous." *Currie v. Schwalbach*, 132 Wis. 2d 29, 36, 390 N.W.2d 575, 578 (Ct. App. 1986) (citations omitted).

B. Legal Standard

Contempt, as relevant here, is the "*intentional* [] disobedience, resistance or obstruction of the authority, process or order of a court [] . . . or . . . refusal to produce a record, document or other object," Wis. Stat. § 785.01(1)(a), (d) (emphasis added), which "is to be used but sparingly[,]" *In re Adam's Rib, Inc.,* 39 Wis. 2d 741, 746, 159 N.W.2d 643, 646 (1968) (citation omitted). Once a *prima facie* showing is made, the burden shifts to the alleged contemnor to show his or her conduct was not contemptuous. *Noack v. Noack*, 149 Wis. 2d 567, 575, 439 N.W.2d 600, 602 (Ct. App. 1989).

A remedial sanction is "imposed for the purpose of *terminating a continuing contempt of court*," *Christensen*, 320 Wis. 2d at 101 (emphasis in original) (citing Wis. Stat. § 785.01(3)), which means that an "action or inaction constituting contempt of court is ongoing and needs to be terminated." *Id.* at 101–02 (emphasis in original). "Without a *continuing* contempt of court, nothing remains to be terminated, and thus, a remedial sanction is unwarranted." *Id.* at 102 (emphasis in original). A remedial sanction is "not designed to punish the contemnor, vindicate the court's authority, or benefit the public[;]" rather, the objective "is to force the contemnor into compliance with a court order for the benefit of a private party—the litigant[.]" *Id*. at 102–103.

C. The circuit court erred in finding contempt of court.

1. The circuit court inappropriately converted AO's Modify Motion into a Motion for Contempt.

On April 20, 2022, AO moved to reopen and to modify the circuit court's order. Modify Motion, R. 194, 196. While AO's Modify Motion included a passing reference to contempt, stating, "The Court should also consider whether contempt is appropriate," and correctly noted that "non-compliance with the Court's order and other issues could be brought to the Court's attention *by a contempt motion* or motion under Wis. Stat. § 806.07," Modify Motion, R. 196;8, 12 (emphasis added), AO explicitly made its Modify Motion under Wis. Stat. § 806.07 (providing for "relie[f] . . . from a judgment [or] order[,]" not contempt), and did not even once mention Wis. Stat. ch. 785 (covering contempt). *See generally* Modify Motion, R. 194, 196. Moreover, because AO's motion was brought under Wis. Stat. § 806.07, its statement in its Modify Motion that non-compliance "could be brought to the Court's attention by a contempt motion or motion under Wis. Stat. § 806.07," Modify Motion, R. 196:11, recognized the distinction between the two types of motions, plainly indicating that AO *didn't* consider its Modify Motion to be a contempt motion.

Despite only the passing reference to contempt, the circuit court *sua sponte* converted the Modify Motion into a motion for contempt. 4/26/22 Hr'g Tr. R. 324:8:17–20. ("I'm not exactly certain what [AO] wants me to do other than take up the question of contempt."), 4:12–13 ("If the [c]ourt *characterized* the present motion as contempt[.]" (emphasis added)).

This was inappropriate, as a contempt motion is to required to be filed by the "person aggrieved." Wis. Stat. § 785.03(1)(a). Accordingly, it was AO's burden to move for contempt under the proper statute and make its *prima facie* case, not the circuit court's role to do it for AO. The circuit court should have only considered the motion presented to it—a motion to modify the court's order.

2. The circuit court inappropriately made a finding of a *prima facie* case.

In the same breath that the circuit court *sua sponte* converted the motion to modify into a motion for contempt, the circuit court also *sua sponte* found that AO had made a *prima facie* case for contempt, 4/26/22 Hr'g Tr., R. 324:8:19–9:7, without affording OSC an opportunity to be heard. It is difficult to fathom how AO was able to make a *prima facie* showing of contempt without ever arguing for contempt, nor ever mentioning the words *prima facie* in its Modify Motion.

In the Modify Motion, AO argued that production was lacking with regard to three categories of documents: **(1)** Contracts and Calenders, Modify Motion, R. 196:4–5, 10–11,[29] which had already been produced to AO, *infra* p. 31 **(2)** Attachments to e-mail messages which had not been originally provided, Modify Motion, R. 196:5, 11[30] and **(3)** documents unrelated to AO's requests, but which AO alleged were improperly deleted, *id*. at 196:5–6, 11. The circuit court properly refused to consider the third category of documents, *see generally* Contempt Order, R. 327, R-App. 82, presumably because documents unrelated to AO's requests are not properly at issue in this lawsuit, *see State ex rel Gehl v. Connors*, 2007 WI App 238, ¶¶ 1, 13, 306 Wis. 2d 247, 249, 256, 742 N.W.2d 530, 531, 534 (Wis. Ct. App. 2007). Accordingly, any documents unrelated to AO's records request were not at issue and will be discussed no further.

The circuit court likewise limited AO's *prima facie* case to these two categories:

> [AO] has made a *prima facie* showing that [OSC] did not fully comply with the Court's order in two respects, that certain documents were omitted and have since been produced and certain documents were omitted which have since been

[29]Which were inadvertently omitted in OSC's first production, but subsequently produced before AO's Modify Motion, *infra* p. 31.

[30]Which had been deleted prior to the initiation of this case and well before the circuit court's order. *Infra* pp. 31–32.

> destroyed or deleted. The burden now shifts to [OSC] to prove that that violation was not intentional.

4/26/22 Hr'g Tr., R. 324:23:16–23.[31]

3. OSC voluntarily remedied any deficiencies.

Prior to AO filing its Modify Motion, OSC had already produced the Contracts and Calendars, which were inadvertently omitted. Westerberg Exhibit B, R. 200; *see also* Contempt Order, R. 327:9, R-App. 91; 4/26/22 Hr'g Tr., R. 324:9:20–21, 23:19–20, 27:14–16. OSC also produced any email attachment it was able recover and pledged to "contact[] each of the persons in the emails above and ask[] such persons to re-send the attachment[]" and produce them as soon as OSC received them. Westerberg Exhibit B, R. 200:3, 7–8. This was done in a good faith effort to resolve the dispute, despite the attachments being deleted prior to litigation and, therefore, not properly a subject of the Mandamus Order. OSC was subsequently able to recover nearly all attachments and voluntarily produced them to AO without court intervention and well before the circuit court's order on contempt. Modify Opp'n, R. 225:4–5, 12–13; *see also* Affidavit of Courtney Turner Milbank and Exhibit B, Rs. 261, 265–297 (filing documents previously produced to AO on May 13, 2022).

Thus, OSC voluntarily produced all records that were the subject of the *prima facie* showing either (**1**) before AO's Modify Motion or (**2**) before briefing on the issue of contempt was completed and the circuit court issued its Contempt Order. AO never disputed receipt of these documents. Thus, OSC was not in contempt when the court issued its Contempt Order.

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[31]While OSC initially said that it would raise the issue of the *prima facie* finding in its subsequent briefing on the Modify Motion, if it was warranted, 4/26/22 Hr'g Tr., R. 324:27:21–28:5, OSC ultimately declined to do so, thereby conceding the initial *prima facie* finding by the court. Response in Opp'n to Motion to Modify, R. 225:7 n.9 ("**Modify Opp'n**").

4. The circuit court's threat of OSC's sole witness deprived OSC of its ability to make a defense to the contempt motion.

On May 10, 2022, OSC designated Niemierowicz, co-custodian and the person who performed all the searches at issue, as its sole witness for the contempt hearing. OSC Witness List, R. 224. If Niemierowicz had been given the opportunity to testify, he would have shown that the alleged deficiencies in production were not intentional or continuing, since there were no other responsive records to be produced. Modify Opp'n, R. 225:2 (detailing the facts that OSC would "present at the hearing."); *see also* Gableman Aff., R. 350:4–5, ¶¶ 25–26, 29–30. However, due to statements made by the circuit court, OSC was unable to present Niemierowicz in its defense to the contempt and, therefore, had no evidence.

As discussed above, at the end of the hearing on OSC's Quash Motion, R. 255[32]—just two days before the contempt hearing—the circuit court made certain perceived threats to Niemierowicz. 6/8/22 Hr'g Tr., R. 314:47:4–20, R-App. 251:4–20. These statements caused Niemierowicz to take the circuit court's suggestion and retain personal counsel, who advised Niemierowicz not to appear and testify, which OSC was informed of after business hours on June 9, 2022. 6/10/22 Hr'g Tr., R. 322:4:19–5:23, R-App. 256:19–257:23. Due to Niemierowicz being unavailable to testify, OSC immediately sought a continuance at the beginning of the contempt hearing, which was erroneously denied. *Id*.

[32]In seeking to quash the subpoena of Gableman, OSC made clear that Gableman's testimony was both unnecessary for and irrelevant to resolving the underlying issues, as Niemierowicz "was responsible for the searches and production of the documents in response to the record requests at issue[,]" and "the person most knowledgeable of the requests, searches, production, and office procedures regarding records requests." Quash Motion, R. 255:3. Additionally, Attorney Dean advised the circuit court that Niemierowicz was the only person who collected the documents and had first-hand knowledge of what was produced. 6/8/22 Hr'g Tr., R. 314:22:8–16, 24:1–4, 24:12–18.

The circuit court attempted to re-color its June 8, 2022 statements as "intended to go over the sanctions," 6/10/22 Hr'g Tr., R. 322:48:10–50:3, but this mischaracterizes the circuit court's comments. The circuit court didn't even hint at reviewing "the *sanctions*," plural, but only *one* sanction. *See generally* 6/8/22 Hr'g Tr., R. 314 (nowhere discussing sanctions generally or one-by-one), 314:47:1–20, R-App. 251:1–20 (including the observation that "*one* of the sanctions that could be imposed is confinement in the Dane County Jail" (emphasis added)). Indeed, that discussion was focused entirely on the circuit court potentially ordering Niemierowicz to jail "spontaneously." *Id.* at 314:47:17–20, R-App. 251:17–20.

While imprisonment is a permissible sanction in appropriate circumstances for contempt, it was inappropriate here: remedial "sanction[s] must be purgeable through compliance . . . [and] be within the power of the person. Thus, it is often said that contemnors 'hold the keys to their own jails.'" *State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 342, 456 N.W.2d 867, 869 (Ct. App. 1990) (internal citations omitted). Accordingly, "[w]hen a contemnor's liberty interests are at risk he or she must be given the opportunity to . . . convinc[e] the court *that the purge condition is unreasonable* . . . . [W]hen a contemnor requests a hearing before being recommitted to the county jail . . . the trial court is obligated to afford the contemnor a meaningful hearing." *State ex rel. V.J.H. v. C.A.B.*, 163 Wis. 2d 833, 843–44, 472 N.W.2d 839, 843 (Ct. App. 1991) (emphasis added). Thus, "spontaneous" imprisonment of Niemierowicz was not available at the upcoming contempt hearing.

In addition, doing so would have been irrational and punitive in nature: the purge in a public records case requires producing responsive records. From jail, Niemierowicz would have no access to OSC's records and it would be impossible for him to search for and produce documents. Thus, spontaneously ordering

Niemierowicz to jail at the hearing would serve no purpose other than to *punish,* which is not what remedial sanctions are for.

Nor would it have been proportional. First, OSC had already produced all documents it was required to produce before the June 10, 2022 hearing, and thus had shown that any contempt was not continuing, which fact was undisputed. Second, AO had not identified any *further* missing documents to show violation still continued and only asked for an order for OSC to look again. Modify Motion, R. 196:11. In calling these arguments "irrelevant" because AO had made a *prima facie* case, Recusal Supp., R. 423:61–62, R-App. 175–176, the circuit court simply sidesteps the argument it purports to refute: the question was not whether there was a *prima facie* case, but whether OSC's undisputed production of the *prima facie* documents meant that OSC had carried its burden to rebut AO's *prima facie* case before the hearing even began because, undisputedly, there was no longer any continuing violation. The Recusal Supplement denies that this was a "principled argument, based in legal authority," *id.* at R. 423:62, R-App. 176, but OSC *had* cited legal authority (controlling statutes and the statutory definition of "remedial sanctions") and transcript evidence (including a discussion of the affidavit and exhibited documents). Recusal Motion, R. 377:28. Thus, OSC maintains the "incarceration" statements were not proportional.

But for the perceived threat of the circuit court, OSC could have called Niemierowicz to the witness stand where he would have testified that the alleged deficiencies were not intentional, nor continuing.

5. The circuit court erred in finding OSC in continuing contempt.

Despite OSC's inability to present *any* defense, the circuit court erroneously denied the continuance and conducted the hearing. *See* 6/10/22 Hr'g Tr., R. 322:15:20–21, R-App. 267. Additionally, without rebuttal being available and without reopening AO's *prima facie* case-in-chief, the circuit erroneously allowed

AO to present additional evidence. OSC's counsel questioned how AO could be permitted to submit "rebuttal" evidence when OSC had presented no case-in-chief to rebut, *see, e.g., id.* at 322:7:4–18, 13:19–22, 17:10–14, R-App. 259:4–18, 265:19–22, 269:10–14, but the circuit court allowed it anyway. And when OSC counsel properly objected to the additional evidence on the grounds of relevance and authenticity, the circuit court *sua sponte* called a witness for AO, AO's counsel, and conducted the direct examination itself, to authenticate proposed exhibits before accepting it, *id*. at 322:43:16–44:11, then proceeded to order OSC in contempt, *id.* at 322:51:7–8, R-App. 274:7–8.

a. The circuit court erroneously used OSC's voluntary remedy as evidence of a "pattern of continuing contempt."

The circuit court erroneously relied on OSC's remedying of the alleged deficiencies, as evidence of a continuing pattern of contempt. Contempt Order, R. 327:9–10, R-App. 91–92. OSC did voluntarily produce the Contracts and Calendar as soon as it was made aware of its inadvertent omission.[33] However, the circuit court's finding—that remedying contempt is also evidence of a continuing contempt—would render the entire jurisprudence and statutory language surrounding remedial sanctions superfluous. It is well established that, in order for a court to issue remedial sanctions, there *must* be a *continuing* contempt. *Christensen*, 320 Wis. 2d at 101. It is also well established that, when an alleged contemnor remedies the contempt before an order is issued, there is no longer any continuing contempt to remedy. *See id.* ("A remedial sanction . . . cannot be imposed if for any reason the contempt has ceased[.]" (citation omitted)). The circuit court's reasoning turns this upside down, finding that OSC's production

[33]Both AO and the circuit court acknowledged receipt of these documents. *See e.g.* Contempt Order, R. 327:9–10, R-App. 91–92; Westerberg Exhibit B, R. 200; 4/26/22 Hr'g Tr., R. 324:27:14–16. AO also acknowledged it had received the subsequent production of the Attachments. 6/8/22 Hr'g Tr., R. 314:32:13–14.

remedying the deficiency is *not* evidence that the contempt is not continuing, but evidence of continuing contempt.

This is not only directly contrary to the well-established jurisprudence, but also violates judicial economy. Courts generally welcome parties attempting to resolve their disputes before invoking the power of the court. Under the circuit court's reasoning, there is no benefit to do so now and litigants would be discouraged from voluntary compliance—fearing that such action would be used against them.

b. The circuit court erroneously relied on faulty evidence to find a "continuing" contempt.

Despite the circuit court originally finding that the *prima facie* case of contempt was limited to the two sets of documents, *see* 4/26/22 Hr'g Tr., R. 324:23:17–21, the circuit erroneously relied on three additional pieces of evidence to find OSC in contempt.

i. The circuit court allowed AO to improperly put on rebuttal evidence.

Wis. Stat. § 805.10 clearly states that "[Petitioner's] rebuttal *shall* be limited to matters raised by any adverse party in argument[,]" (emphasis added). As the circuit court had already found that AO had established its *prima facie* case, the burden had shifted to OSC. When OSC presented no evidence, there was nothing for AO to rebut.

OSC counsel properly objected that AO being "allow[ed] . . . to supplement their case in chief . . . on rebuttal when I've not presented a case in chief [was] procedurally erroneous." 6/10/22 Hr'g Tr., R. 322:17:11–14, R-App. 269:11–14. Despite this, the circuit court allowed AO to call a witness anyway and to introduce additional evidence. *See generally* 6/10/22 Hr'g Tr., R. 322.

The evidence used by the circuit court to find continuing contempt was provided in AO's improper rebuttal and was thus erroneously relied upon.

ii. The circuit court erroneously relied on records not in possession of OSC until May to find contempt.

The circuit court also erroneously relied upon a document produced in response to a separate records requests (unrelated to the ones at issue in the Mandamus Petition) to find OSC in contempt—suggesting that the document should have been produced previously. Contempt Order, R. 327:11–12, R-App. 93–94.[34] However, AO admitted it didn't know when the document had come into OSC's possession. 6/10/22 Hr'g Tr., R. 322:44:19–22. Moreover, this document was *not* in OSC's possession when the requests at issue were made. Instead, OSC received the document on May 23, 2022—nearly eight months after the requests at issue, Gableman Aff., R. 350:4–5, ¶ 29—and it could not properly be a subject of those requests and could not be evidence of continuing contempt.

iii. The circuit court erroneously relied upon citations to a deposition, which was not properly before the court.

The circuit court also erroneously relied upon the deposition transcript of Niemierowicz. Video Deposition of Zakory W. Niemierowicz June 6, 2022, R. 317 ("**Niemierowicz Tr.**"); Contempt Order, R. 327:10–11, R-App. 92–93. First, the deposition was not admitted into evidence. *See generally* 6/10/22 Hr'g Tr., R. 322 (AO *only* moved to admit two exhibits–the Assembly's responses to requests for admission, R. 320, and records received from OSC in response to a completely unrelated request, R. 321). Second, entering the deposition into evidence would not have been proper. Wis. Stat. § 804.07 governs the use of depositions in court proceedings and there is no applicable provision under that section which would

[34]When AO presented evidence that had not been authenticated (and was properly objected to), the circuit court relieved AO of its duty to authenticate and did AO's job for it by calling a witness and conducting the direct examination itself. In doing so, the circuit court acted as an advocate, not a judge. 6/10/22 Hr'g Tr., R. 322:43:22–44:11. The circuit court then relied upon that evidence in finding OSC in contempt.

allow use of Niemierowicz's deposition in this circumstance, nor was there any application or notice to do so.

Even if the deposition were properly relied upon, it does not lead to an inference of continuing contempt. The circuit court took three "averments" and from that stated the "OSC appears to have attempted to comply with the [circuit] [c]ourt's order through an agent with limited knowledge of the public records law and no knowledge of the subject records." Contempt Order, R. 327:11, R-App. 93. Yet, none of the circuit court's quotes provide a basis for a contempt finding.

The first "quote" from the circuit court is that "Niemierowicz averred that OSC employed a 'classified person' whose records cannot be, and have never been, released." *Id.* (citing Niemierowicz Tr., R. 317:78). Niemierowicz never said this. Instead, Niemierowicz confirmed that *all* contracts OSC had were produced, that not all personnel had contracts, and that, if a contract wasn't produced for a certain person, it was because no contract existed. Niemierowicz Tr., R. 317:77:8–78:8. OSC cannot be obligated to produce a document that does not (and never did) exist.

The second "quote" from the circuit court is that "Niemierowicz averred to have been responsible for producing records but did 'not know the specific origins of each of those documents [he was producing] . . .'" Contempt Order, R. 327:11, R-App. 93 (citing Niemierowicz Tr., R. 317:130). In reality, Niemierowicz stated "the 800 documents were collected many months ago, so I do not know the specific origins of each of those documents and who I got it from or where I found it." Niemierowicz Tr., R. 317:130:17–20 (indicating that he didn't recall the specific origins compiled over 6 months prior, not that he never knew the origins). Further, the circuit court stated that "Niemierowicz averred to 'not have the authority' to require records production and to have never questioned records given to him for production." Contempt Order, R. 327:11, R-App. 93 (citing

Niemierowicz Tr., R. 317:191). Again, in reality, Niemierowicz stated he himself "would not have the authority" to "require OSC staff to take any steps with respect to open records requests," Niemierowicz Tr., R. 317:191:18–21, but that "Justice Gableman . . . directed [him] to work with [the employees]" so the authority came from Gableman, *id.* at 317:191:21–192:2.

The final "quote" from the circuit court is that "Niemierowicz averred to a belief that a custodian may somehow evade the public records law by immediately destroying a record." Contempt Order, R. 327:11, R-App. 93 (citing Niemierowicz Tr., R. 317:142). Niemierowicz never suggested a custodian could "evade" the Public Records Law. *See generally* Niemierowicz Tr., R. 317. Instead, in discussing the text messaging app "Signal," Niemierowicz discussed that the platform auto-deleted text messages. *Id*. at 317:14–317:15. Ultimately, this discussion about whether messages could be deleted before a records request is submitted is irrelevant to this case, as OSC's record retention policies are not at issue. *Gehl*, 306 Wis. 2d at 249, 256.

iv. The circuit court erroneously relied on silence of witness.

Finally, the circuit court erroneously drew an "adverse inference" from Gableman's refusal to testify. Contempt Order, R. 327:12, R-App. 94. Gableman *didn't* invoke the Fifth Amendment, but simply his need for representation—a need that the circuit court had raised *sua sponte* just two days prior. 6/10/22 Hr'g Tr., R. 322:35:13–37:2. It is, therefore, unclear that an inference *may* even be drawn at all. Indeed, Wisconsin recognizes the right to counsel in contempt cases in which incarceration is a possibility. *Ferris v. State ex rel. Maass,* 75 Wis. 2d 542, 545, 249 N.W. 2d 789, 791 (1977). Even in civil contempt proceedings, "such a person is entitled to counsel." *Id.* at 546. Accordingly, when a contempt defendant who may "hav[e] to spend time in jail[,] . . . wants to obtain counsel, *the court should give the defendant a reasonable time [] to retain counsel . . . before*

proceeding on the contempt motion." *State v. Pultz*, 206 Wis. 2d 112, 132–33, 556 N.W. 2d 708, 717 (1996) (emphasis added). Two days (the amount of time between the June 8, 2022 hearing, at which the circuit court made its warning about incarceration, and the June 10, 2022 contempt hearing) is very little time. That a negative inference should be drawn from Gableman not having obtained counsel within two days, then, was erroneous.

For each of the forgoing reasons, the circuit court erred in finding OSC in contempt.

D. The circuit court also issued erroneous "remedial" sanctions.

Having erroneously found OSC in contempt, the circuit court also imposed sanctions of "$2,000 each day, the maximum daily forfeiture under Wisconsin statute[,]" Contempt Order, R. 327:2, R-App. 84, with purge conditions as follows:

> a. [] Gableman shall submit evidentiary proof to a reasonable degree of certainty that he has complied with the Court's January 25, 2022, order to search for and produce records responsive to the Petitioner's requests. This proof shall specify each individual source searched and the steps taken to search that source.
>
> b. [] Gableman shall submit evidentiary proof of reasonable efforts to search for deleted, lost, missing, or otherwise unavailable records, or provide an explanation of why such a search would not be reasonable.
>
> c. [] Gableman shall submit evidence describing any responsive records he withholds and the reasons for withholding, but he shall not withhold any records unless because of a clear statutory exemption to disclosure.
>
> d. Evidentiary proof should take the form of a sworn affidavit describing the steps taken to comply with each of these purge conditions

Id. at 327:25, R-App. 107.

When a court imposes purge conditions for *remedial* sanctions, satisfaction of the purge conditions must (a) "be within the power of the contemnor," and (b) "reasonably relate to the cause or nature of the contempt." *In re Marriage of Larsen*, 159 Wis. 2d 672, 676, 465 N.W.2d 225, 227 (Ct. App. 1990), aff'd, 165 Wis. 2d 679, 478 N.W.2d 18 (1992).

The contemnor here was OSC, and the sanctions were remedial. *See generally* Contempt Order, R. 327, R-App. 82. The purge conditions, however, were imposed on Gableman to show that "he" has complied with the circuit court's Mandamus Order. Contempt Order, R. 327:25, R-App. 107. Gableman has never been a party to this action, nor, as an individual, could he testify to actions of other persons within OSC.

OSC has repeatedly made clear that Gableman properly delegated the searches and production to his chief-of-staff and co-legal custodian Niemierowicz. So it was erroneous for the circuit court to impose purge conditions on Gableman as an individual, rather than OSC.

The purge conditions also do not even *contemplate* what the alleged contemnor, OSC itself, might do to satisfy them. On their face they fail to provide an opportunity that is "within the power of the contemnor," OSC, to purge its contempt. *Marriage of Larsen*, 159 Wis. 2d at 676.

Nor do the purge conditions "reasonably relate to the cause or nature of the contempt." *Id*. The purge conditions fail to identify even *one* record from the relevant time period that was not produced, which would need to be produced for OSC to purge its contempt. Instead, the circuit court required Gableman to essentially "go look again."[35] As a result, the purge conditions were improper and erroneous.

[35]In doing so, the circuit court erroneously used a civil-contempt order, which would have ordered the production of an improperly withheld document, as a discovery compel order, ordering OSC to go look again to see if there are any other responsive documents, even though AO never moved to compel.

E. The circuit court erred in affirming the prior finding of contempt and imposing $24,000 in remedial sanctions.

Despite the circuit court finding that the "go look again" purge conditions had been fulfilled by subsequent searches, which found no additional responsive documents, thus verifying that responsive documents had *already* been produced before the contempt finding, Purge Order, R. 424:2, R-App. 208; Gableman Aff., R. 350; Gableman Supp. Aff., R. 409, the circuit court ordered OSC to pay the sanctions totaling $24,000, Purge Order, R. 424:3, R-App. 208. This was in error since all responsive documents had already been produced before the contempt order, so no remedial sanctions or purge conditions were necessary to "remedy" a contempt.

For these reasons, this Court should vacate the Contempt Order, R. 327, R-App. 82, and Purge Order, R. 424:3, R-App. 208 ($24,000 sanction).

III. The circuit court erred in refusing to continue the contempt hearing.

Although the contempt finding, purge conditions, and remedial sanctions were improper in and of themselves, the circuit court *also* erred by refusing to grant OSC's request for continuance of the contempt hearing in the first place, *supra* 32–34. *See Bowie v. State*, 85 Wis. 2d 549, 556–57 (1978); *Noack*, 149 Wis. 2d at 572–73.

A. Standard of Review

"The trial court's ruling on a motion for continuance" should be set aside if "the trial court erroneously exercised its discretion." *State v. Echols,* 175 Wis. 2d 653, 680, 499 N.W.2d 631, 640 (1993) (citations omitted). A trial court abuses its discretion when it fails to act "in accordance with accepted legal standards and in accordance with the facts of record." *State v. Wollman,* 86 Wis. 2d 459, 464, 273 N.W.2d 225, 228 (1979) (citation omitted).

B. Legal Standard

While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process[,] [t]he answer must be found in the circumstances present in every case, particularly in the reasons presented . . . at the time the request is denied." *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964) (citations omitted).

Three factors are of particular import for the trial court to consider:

> In . . . a motion for a continuance due to the absence of a witness, the trial court should consider . . . whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located.

Bowie, 85 Wis. 2d at 556–57 (citation omitted).

C. The circuit court should have granted OSC's request for continuance.

Given that OSC's counsel was advised after business hours on June 9, 2022, that, as a result of the circuit court's comments, Niemierowicz would not be appearing, OSC moved to adjourn the hearing. 6/10/22 Hr'g Tr., R. 322:4:19–5:23, 10:10–15, 13:4–22, R-App. 256:19–257:23, 262:10–15, 265:4–22. OSC's counsel made it abundantly clear that OSC was unable to present a defense or a case-in-chief, given that OSC's only designated witness refused to appear and testify, and thus that it had no witnesses to testify. *See, e.g.*, *id.* at 322:4:19–5:23, 47:10–14, R-App. 256:19–257:23, 270:10–14.

In refusing to grant OSC's motion to adjourn and grant a continuance in light of the unavailability of Niemierowicz or any other witness to present in its case-in-chief, the circuit court didn't give proper weight to any of the relevant factors, all of which favored OSC. The circuit court considered neither the general circumstances nor the particular reasons presented, thus disregarding "the facts of record." The circuit court likewise disregarded the "accepted legal standards."

Wollman, 86 Wis. 2d at 464. It thereby abused its discretion in failing to grant a continuance, which denied OSC the right to present its case-in-chief and defense.

First, in this case, not only was Niemierowicz' testimony material, he was the *sole* and *chief* witness—the records custodian most familiar with the storage of the records, the only person who collected the documents and had first-hand knowledge of how and what was produced and, as a result, the only person OSC noticed as a witness. *Supra* n.32. In his absence, OSC was *unable* to present any witness or evidence in its case-in-chief in its defense to the contempt. 6/10/22 Hr'g Tr., R. 322:47:10–14. His testimony was not only material, but indispensable.

Second, OSC was *not* guilty of any neglect in attempting to procure Niemierowicz' attendance. Indeed, OSC had fully prepared for his attendance. As detailed above, it was not until the hearing on the afternoon of June 8, 2022—less than 48 hours before the contempt hearing—that the circuit court advised Niemierowicz to seek personal counsel because of risk of being jailed "spontaneously" at the contempt hearing. Niemierowicz secured such personal counsel the next day, who advised him not to appear. Counsel communicated to OSC that Niemierowicz would not appear on the evening of June 9, 2022, less than 24 hours before the hearing. This does not demonstrate any neglect on OSC's part.

Third and finally, there was reasonable expectation that Niemierowicz could be located. If given a reasonable continuance, OSC would have been able to subpoena Niemierowicz. However, since the continuance was denied, OSC could do nothing. Therefore, all three factors favored OSC. In declining to grant that motion, the circuit court abused its discretion.

Nor was there any other reason to deny OSC's motion for adjournment and continuance, as it was timely. The circuit court erred in finding the opposite. 6/10/22 Hr'g Tr., R. 322:15:23–24. "On occasion, unexpected situations arise that are beyond control, making court appearances impossible and leaving no time to

explain." *Noack*, 149 Wis. 2d at 573. In *Noack*, which the circuit court relied upon (without considering the factors it elucidates on this issue), Contempt Order, R. 327:1, 5–6, 8–9, R-App. 83, 87–88, 90–91, the Court of Appeals observed that in such cases, "the risk of erroneous deprivation [of liberty and property] and the probable value of additional safeguards are low" precisely because "[a]lleged contemnors who can give reasoned explanation for their failure to comply with court orders will generally come to court and present a case. If they cannot come to court, they may arrange for a continuance," *Noack,* 149 Wis. 2d at 572. Thus, the court concluded, in a case in which a defendant failed to appear and testify and *no explanation ("reasonable" or otherwise) was ever provided despite opportunity to do so*, so that the defendant was found in contempt without having provided a defense, that "[t]he balance . . . weighs heavily towards the conclusion that the procedure used here satisfies the requirements of due process." *Id.* at 573.

Here, the scales are in precisely the opposite position. *Despite* the fact that an emergency *did* occur; *despite* the fact that OSC did give a "reasoned explanation;" and *despite* OSC's attempt to arrange for a continuance *after* "providing the court with reasons for" Niemierowicz's refusal to appear to testify, the motion for continuance was denied. *Id*. at 572. This is precisely what *Noack* contemplated as the type of situation in which a last-minute motion for continuance was both necessary and appropriate.

As a result, this Court should vacate the Contempt Order, R. 327, R-App. 82 and Purge Order, R. 424:3, R-App. 208 ($24,000 sanction).

IV. The circuit court erred in declining to recuse.

Judge Remington erred in declining to find that his conduct constituted **(1)** explicit, actual bias in certain instances, and **(2)** an appearance of bias revealing a great risk of actual bias in certain instances and in the totality of the

circumstances, both of which require recusal under Wis. Stat. § 757.19 and under the fair-trial doctrine as informed by SCR 60.04(4).

An explicit confirmation that a judge made up his mind on an issue before argument constitutes "actual bias" requiring recusal, *State v. Goodson*, 2009 WI App 107, ¶ 16, 320 Wis. 2d 166, 176, 771 N.W.2d 385, 390 (Ct. App. 2009), while even the *appearance* of having "prejudged the merits" combined with certain other behaviors can similarly require recusal, *State v. Walberg*, 109 Wis. 2d 96, 107–09, 325 N.W.2d 687, 693 (1982).

As OSC will show, recusal was required here (a) by actual bias or the appearance of bias which, when considered with the totality of the circumstances, revealed a great risk of actual bias, under the objective tests, and (b) by the circuit court's failure to properly subjectively determine that its conduct constituted bias under the subjective test.

Accordingly, this Court should find that Judge Remington should have recused, vacate the circuit court's Mandamus Order, punitive damage award, contempt finding, purge conditions, and sanctions, and, if any issues remain, remand to a different judge. *See, e.g., In re Paternity of B.J.M.*, 2020 WI 56, ¶ 35, 392 Wis. 2d 49, 70, 944 N.W.2d 542, 552 (2020).

A. Standard of Review

Under the objective tests discussed below, a judge's decision on recusal is a question of law reviewed de novo, with the reviewing court making the rebuttable presumption that the judge below was unbiased. *State v. Pinno*, 2014 WI 74, ¶¶ 39, 92, 356 Wis. 2d 106, 131, 156–157, 850 N.W.2d 207, 219, 232 (2014) (citations omitted). Under the subjective test, the reviewing court is required to determine whether the judge appropriately made the subjective determination. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 186, 443 N.W.2d 662, 666 (1989).

B. Legal Standard

1. The objective test under Wis. Stat. § 757.19.

Wis. Stat. § 757.19(2)(g) ("**Recusal Statute**") was previously held to include an objective standard—which OSC argues in good faith[36] should be restored—and a subjective standard.

The objective test under the Recusal Statute ("**Statutory Objective Test**"), once well-established, required "an objective test based on whether impartiality can reasonably be questioned, . . . [and] remains for [the appellate court's] consideration," after the subjective test is satisfied. *Walberg*, 109 Wis. 2d at 106, 106 n.13.

a. The Statutory Objective Test should be restored.

While the Statutory Objective Test was removed from Recusal Statute analysis in *American TV*, 151 Wis. 2d at 182, OSC argues that it should be restored, for the same cogent reasons provided in C.J. Abrahamson's concurrence in *Harrell*, which points out, *inter alia*, that the subjective test effectively requires "a reviewing court . . . to confer its imprimatur on a challenged judge's decision . . . ," 199 Wis. 2d at 669–70 (Abrahamson, C.J., concurring). This is untenable since, as ethics scholars frequently point out, "the more biased the target judge is, the less likely that judge is to recuse himself, because recusal disables the judge from being able to rule in favor of the side toward which he is predisposed, or against the side toward which the judge harbors a bias," Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1170 (2015) ("***Recusal Procedure***"). As a result, except in extreme circumstances, the subjective standard has no teeth, and the objective standard should be restored.

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[36] *See* Wis. Stat. § 802.05(2)(b); SCR 20:3. In light of the fact that C.J. Abrahamson has argued for this test's restoration, *State v. Harrell*, 199 Wis. 2d 654, 669–70, 546 N.W.2d 115, 121 (1996) (Abrahamson, C.J., concurring), OSC's parallel argument, made with candor about current jurisprudence, is nonfrivolous, good-faith argumentation.

b. The Statutory Objective Test considers *totality of the circumstances* for *appearance* of bias.

The Statutory Objective Test, whether impartiality can reasonably be questioned, developed largely under due process jurisprudence.[37] First, an impartial, fair judge is fundamental to due process. Although a judge is presumed to act fairly, a party may overcome this presumption by a preponderance of the evidence. *B.J.M.*, 392 Wis. 2d at 59–60, 62. A judge must recuse if a reasonable person could conclude, based on the totality of the circumstances, that the judge failed to give a fair trial—meaning that objective bias is based on the *appearance* of bias, not to the judge himself, but to a reasonable, objective observer. *Id.* at 58, 62–64, 70–71; *id.* at 71–73 (J. A. Bradley, concurring); *State v. Herrmann*, 2015 WI 84, ¶¶ 26–27, 30–41, 364 Wis. 2d at 348–55, 867 N.W.2d 772, 778–81 ("all the circumstances"); *Walberg*, 109 Wis. 2d at 108 (finding impartiality could reasonably be questioned because certain remarks, "when taken together with the judge's *entire course of conduct* during the pretrial proceedings," created appearance of partiality, even though "standing alone[they] would not" have. (emphasis added)). When such an "appearance of bias reveals a great risk of actual bias," a judge must recuse. *Herrmann*, 364 Wis. 2d at 340 (citations omitted).

2. Subjective Test under § 757.19(2)(g): the judge's own determination.

The Recusal Statute's *subjective* inquiry ("**Subjective Test**") requires recusal when a judge "determines that, for any reason, he cannot, *or it appears he cannot*, act in an impartial manner." *Pinno*, 356 Wis. 2d at 157 (cleaned up and emphasis added). Notably, case law does not suggest this is an adversarial determination. Quite the opposite: this determination is to be "the judge's own."

[37] *Walberg*, analyzing a *due process* recusal claim, noted that the objective and subjective tests it employed were "also the standard established by . . . Sec. 757.19(2)(g)." 109 Wis. 2d at 106 n.13. While *American TV* declined to find an objective test under the Recusal Statute, it didn't change the analysis for that test.

Herrmann, 364 Wis. 2d at 348 (citation omitted). In other words, a judge's finding that a party's allegations didn't prove the appearance of bias does not mean the judge has completed the task of determining for himself whether he created such an appearance, nor does the judge's consideration of each "bias-creating" event, *individually*, mean he has determined whether the totality of the circumstances created such an appearance.

a. Appearance of bias under the Subjective Test.

The appearance of bias under the Subjective Test is to be determined based on the totality of the circumstances.[38] Thus, a judge who does not consider the totality of the circumstances cannot make the determination under the Subjective Test.

b. The determination "exercise" is what is required.

Thus, although this determination *is* the judge's own, he still must complete the "exercise of making" it, *Harrell*, 199 Wis. 2d at 664, 546 N.W.2d at 119, deciding whether he is biased *and* whether he *appears* biased from *all circumstances*.

While a judge's mere "declaration" of his "determination of [no] actual or apparent inability to act impartially," *Am. TV*, 151 Wis. 2d at 186, often satisfies the test, it does not overcome the "exercise" requirement. Thus, although certain

[38]Although the "appearance" analysis in the cases was performed as part of an objective test, logic dictates the "appearance" analysis required by the Subjective Test must be the same. *Walberg* confirms this, affirmatively showing that the "due process" test and the statutory test employ the same "appearance" framework. *Supra* n.37. Thus, despite the circuit court's contention that SCR ch. 60 (and its consideration of the totality of the circumstances) is inapplicable, Recusal Supp., R. 423:84–85, R-App. 198–199, the "appearance" requirement of the Subjective Test requires consideration of the totality of the circumstances. This is only logical: whether a judge might "appear" biased is by its nature a question that can only be determined in light of *all* relevant facts, since the "appearance" of bias does not necessarily manifest from any one discrete occurrence. Indeed, even *American TV*, which confined itself to the Subjective Test, made its determination "on the basis of *all of the[] facts*." 151 Wis. 2d at 186–88 (emphasis added).

cases applying this test to the particular facts of the case, such as *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659, 661 (Ct. App. 1991), have stated that a "trial judge's declaration that he was not biased satisfies the subjective test," these cases have considered *due process* claims in addition to statutory claims, separately analyzing for *appearance* of bias, *see, e.g.*, *Rochelt*, 165 Wis. 2d at 379–82, foreclosing the need to analyze whether the judge should have declared his subjective "appearance" determination. In contrast, because the *State v. Carviou* court *didn't* have occasion to rule on whether there was an appearance of bias, it remanded the case to the judge below, who had not made an "appearance" determination. 154 Wis. 2d 641, 646, 454 N.W.2d 562, 564 (Ct. App. 1990). So the mere-declaration cases cannot be read as overruling the plain reading of the statute invoked by *American TV* (in which no due process claim was analyzed), requiring an *appearance* determination. *See also Storms v. Action Wisconsin Inc.*, 2008 WI 110, ¶ 24, 314 Wis. 2d 510, 526, 754 N.W.2d 480, 488 (2008) (noting determination considers partiality "in fact or in appearance"). Such a determination is clearly required by the statute's plain meaning and therefore its controlling meaning. *Kalal*, 271 Wis. 2d at 663.

Thus, the general deference afforded a mere "declaration" of no bias should not apply when there was no "exercise" of making the *full* determination. Such evidence could be, for example: **(1)** a total omission to make one part of the determination (such as the "appearance" part plainly required by the statute), or **(2)** a refusal to make that determination in the manner required (such as explicitly refusing to analyze the totality of the circumstances in order to make the "appearance" determination). Additionally, **(3)** because it strains credulity to suggest the legislature didn't intend for the Subjective Test to have any effect against a judge who claims to have determined he showed no appearance of bias *even when* he engaged in actions that explicitly constitute "definitive evidence of

actual bias" under Wisconsin precedent,[39] (or when the totality of circumstances shows similarly strong evidence[40] or other too-strong-to-ignore indications of bias[41]), such contrary-to-law "determinations" should also overcome the deference often afforded to no-bias declarations.

The circuit court cites *Ozanne v. Fitzgerald*, 2012 WI 82, ¶¶ 31–33, 37, 822 N.W.2d 67 (Mem.) (2012), to suggest a judge need not "even underst[an]d the allegations against him," in order to reach a sufficient subjective determination. Recusal Supp., R 423:81–82, R-App. 195–196. *Ozanne*, however, was a split decision, with no majority decision. And for the reasons set forth above, it is clear that a true "determination," *properly analyzing the true facts and allegations of the case and applying controlling law that explicitly defines "actual bias,"* is required.[42]

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[39] Such as an "explicit [] confirm[ation] that [a] [ruling] was predecided," *Goodson*, 320 Wis. 2d at 176.

[40] *See, e.g.*, *Walberg*, 109 Wis. 2d at 107–08 (appearance that judge "prejudged the merits" created by statements harming defense, together with "expression[s] of irritation with defense counsel for bringing what it believed to be 'frivolous' motions and objections, and generally wasting the court's time," created appearance of partiality under an objective test such that judge's failure to recuse was error). Explicit evidence of predetermination exists where "the record demonstrates that the judge in fact had made up his mind" about a matter before receiving arguments on the matter. *Goodson*, 320 Wis. 2d at 175–76. Such a predetermination is distinct from simply expressing "a general opinion regarding a law at issue in a case before him or her," *id.* at 176 (citation omitted), because it involves "prejudg[ing] the *facts* or [] *outcome* . . . ." *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005) (emphases added).

[41] Such as a judge having indicated that an attorney could not make his record. *See Walberg*, 109 Wis. 2d at 108–09.

[42] This comports with the definition of the word: a "determination" requires "deciding something officially," DETERMINATION, Black's Law Dictionary (11th ed. 2019), and such a "decision" must "consider[] the facts and the law," DECISION, *id.* This requires an "exercise," not just an "announcement."

3. Code of Judicial Conduct

Wisconsin's Code of Judicial Conduct ("**Judicial Code**") provides an additional objective test for recusal ("**SCR Test**").[43] Under SCR 60.04(4), "[A] judge shall recuse himself or herself in a proceeding . . . when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial[.]"

a. The Judicial Code is applicable.

As C.J. Abrahamson notes in a concurrence, the Judicial Code is applicable when considering "grounds of judicial disqualification," and "require[s] '[a] subjective test based on the judge's own determination of his or her impartiality and an Objective Test based on whether impartiality can reasonably be questioned.'" *Harrell*, 199 Wis. 2d at 667 (Abrahamson, C.J., concurring) (quoting *Walberg*, 109 Wis. 2d at 106). And although *American TV* found that the Judicial Code was applicable only to ethical questions of recusal, not legal, 151 Wis. 2d at 185, *Pinno* came to the opposite conclusion, *infra* Part IV.B.3.c.

Furthermore, *American TV* didn't analyze whether the Judicial Code was applicable to fair trial considerations, but only rejected its application to the recusal statute. 151 Wis. 2d at 181, 185 (determining whether a justice "was disqualified under sec. 757.19(2)(g), Stats.," finding cases discussing "recusal issues under the [Judicial Code] . . . [we]re not applicable *[t]here*" (namely, to a case in which *only* a statutory basis for recusal had been alleged.)). The Judicial

[43]When referenced collectively with the Statutory Objective Test, "**Objective Tests**."

Code, then, is applicable to *both* claims for due process *and* for the protection of a fair trial *beyond* what due process requires.[44]

b. "Fair trial" doctrine is applicable to government.

That the government *is* entitled to a reasonably fair trial, despite the fact that it is not entitled to certain *constitutional* due process rights, explains why the Wisconsin Supreme Court can readily refer to "the government's right to due process." *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 224, 594 N.W.2d 370, 376 (1999). Thus, while a court may rightly deny governmental claims for *constitutional* due process, prohibiting unfair prejudice to the government is *not* tantamount to tacitly claiming the government has due process rights. Courts recognize that the "due process" of hearing and opportunity to respond is a right the government does have. *See, e.g.*, *Mercer v. Mitchell*, 908 F.2d 763, 769 (11th Cir. 1990).

Distinct from constitutional due process, "reviewing courts must . . . consider" the long-established "common law doctrine of fair trial." *State v. Allen*, 2010 WI 10, ¶ 130, 322 Wis. 2d 372, 428, 778 N.W.2d 863, 891–92 (2010) (reproducing "hauntingly relevant" unpublished Supreme Court dissent from C.J. Abrahamson, ¶ 129). This common law doctrine is part of the larger spring of common law due process, as distinct from constitutional due process. *See, e.g.*, *Pro. Massage Training Ctr., Inc. v. Accreditation All. of Career Sch. & Colleges*, 781 F.3d 161, 177 (4th Cir. 2015) ("although we are considering a *common law due process claim* rather than a constitutional one, a 'fair trial in a fair tribunal' remains a basic requirement of due process." (emphasis added) (quoted source omitted)). OSC is protected by the "due process" afforded under the common-law

[44]Although due process *jurisprudence* is applicable because "it informs the objective standard under SCR 60.04," Recusal Motion, R. 377:3, the circuit court overlooked this. *See, e.g.*, Recusal Supp., R. 423:16, R-App. 130 ("unavailable protections"), 82, R-App. 196 ("due process has no application to this case").

fair trial doctrine. "The common law duty of disqualification applies where no statutory provisions for disqualification are spelled out." *Kachian v. Optometry Examining Bd.*, 44 Wis. 2d 1, 13, 170 N.W.2d 743, 749 (1969).

c. *Pinno* confirms Judicial Code applicability.

Similarly, rights established in ethical codes may "'provide more protection than due process requires.'" *Pinno*, 356 Wis. 2d at 158 (quoted source omitted). While *American TV* held that the Judicial Code does not itself govern the legal standard of recusal, 151 Wis. 2d at 185, *Pinno* analyzed the Judicial Code *after* explicitly recognizing that constitutional due process had not been violated, 356 Wis. 2d at 158, thus making clear that a party's interests may be "protected" by appellate review employing the Judicial Code as a frame of reference. *Id.* ("[W]e turn to the [SCR] to analyze Seaton's recusal claim.").

It is unclear whether *Pinno* indicates that the Judicial Code itself *could* be a basis for appellate review of a recusal decision or whether it was, in deference to its common-law duty to ensure a fair trial, analyzing it as a *guide* to what constituted a fair trial (just as other courts have used it as a guide to constitutional due process claims). Regardless, the Judicial Code *is*, under *Pinno*, applicable to review of a judge's recusal decision even when *constitutional* due process is not raised. *Carviou*'s finding that "violation of the Code of Judicial Ethics is not grounds for recusal *under sec. 757.19(2), Stats.*," 154 Wis. 2d at 643 (emphasis added) (cited in Recusal Supp., R. 423:83, R-App. 197), does not change the fact that the Judicial Code informs fair-trial considerations.

4. Three tests total; none requires teasing out motives of the heart.

Three tests are applicable here: **(1)** the Subjective Test in Wis. Stat. § 757.19(2)(g), which requires a judge to make a non-adversarial determination on bias and appearance thereof; **(2)** the Objective Test (which should be restored), requiring recusal if a reasonable observer would find, based on the totality of the

circumstances, an appearance of bias; and **(3)** the SCR Test, requiring recusal for the same "appearance" reason, and applicable to preserving common-law fair trial protections.

Judge Remington posits that OSC gives no "explanation for why" he is biased, Recusal Supp., R. 423:2–3, R-App. 116–117, that "[t]he reason for" the bias is central, and that "OSC is indistinguishable from every other party which loses a lawsuit[,]" *id*. at 423:4–5, R-App. 118–119. It is not surprising that no citation is provided for the "centrality" claim since, as the discussion above demonstrates, nothing requires a party to tease out the hidden motives of a biased judge's heart. Although OSC therefore disagrees with this claim, two things are nonetheless true: **(1)** OSC didn't file its Recusal Motion because of any losses. Instead, it properly appealed those decisions and trusts that the appellate courts will come to the correct result. As it did below, OSC limits its recusal discussion to the actions and statements by the Judge that demonstrate bias requiring recusal, *not* to his legal conclusions. **(2)** As will be shown, the Recusal Supplement itself reveals the motive for Judge Remington's bias. *Infra* IV.C.2.a. So if demonstrating motive is required, OSC will do so.

C. Conduct of Judge Remington demonstrated bias requiring recusal.

Judge Remington neglected to subjectively determine whether he created an impermissible appearance of bias.[45] However, unlike *Carviou*, 154 Wis. 2d at 646, here it is unnecessary to remand the case for this determination, as this Court should find that he was required to recuse because of non-permitted actual bias or

[45]While he did, in the Recusal Order filed after only a few hours of reviewing the Recusal Brief (*infra* pp. 99-100), state, "OSC does not meet its burden to prove . . . appearance of bias," Recusal Order, R. 379:1, R-App. 109, he neither makes a subjective determination on the matter (*see supra* Part IV.B.2. (noting this is not an adversarial determination)), nor analyzes beyond this bare conclusion whether there was such an appearance (*see generally id.* at 379:4–5, R-App. 112–113 ; *see also infra* n.61 (discussing lack of determination in Recusal Supplement)). *See supra* Part IV.B.2.b. (discussing need for proper analysis).

the appearance thereof. Nevertheless, if any issues remain for trial court determination, this Court should remand for "new [proceedings] before a different judge." *Goodson*, 320 Wis. 2d at 177.

Given the volume of pages of Judge Remington's Recusal Supplemental and the numerous bias-reflecting statements throughout this case, OSC does not address every transgression. Instead, OSC focuses on the most egregious categories of demonstrated bias.

1. Circuit court demonstrated actual bias.

Various discrete events *in and of themselves* showed bias requiring recusal under all three tests, constituting definitive evidence of actual bias—thus requiring recusal under the Objective Tests—so explicitly that a true "appearance" determination could only conclude there was an appearance of bias requiring recusal under the Subjective Test.

a. Predetermination on jurisdiction and writ.

From the very beginning, the conduct of the circuit court judge demonstrated bias. The circuit court made clear during the first hearing on January 21, 2022, that it had predetermined that it would rule against OSC on its Dismissal Motion, Rs. 98, 99, and on the jurisdictional issues it raised. The circuit court stated it would "hedge" on the jurisdictional issue, but exercised jurisdiction anyway, framing the *legal* issue as one of fact. Recusal Motion, R. 377:5–6; *see also supra* n.7. Regarding the merits of the writ, the circuit court admitted that its determinations concerning the applicability of the public records statute were without "the benefit of briefing." 1/21/22 Hr'g Tr., R. 148:54:10–11. Indeed, OSC had submitted its Dismissal Motion, Rs. 98, 99,[46] *one day* before the January 21, 2022 hearing, leaving little time for review, let alone a response and reply. Nonetheless, the circuit court summarily rejected all of OSC's arguments, 1/21/22

[46]OSC filed an Amended Motion to Dismiss or Quash, R. 105, on the date of the hearing.

Hr'g Tr., R. 148:54:12–59:19, and asked AO counsel "*whether you agree with me* that the time has passed for coming up with new reasons," *id.* at 148:64:2–3 (emphasis added), indicating Judge Remington had already decided the issue, and ordered submission of documents for in-camera review, *Id.* at 148:59:16–60:24. As OSC would explain in its Dismissal Reply, the presumption of access to public records is "conditioned on the absence of other laws to the contrary," *id*. at R. 150:3 (quoting *Munroe v. Braatz*, 201 Wis. 2d 442, 448–49, 549 N.W.2d 451, 454 (Ct. App. 1996)), and in-camera review is foreclosed if such an exception applies, *id*. at 150:2. Although the circuit court issued its opinion on the Dismissal Motion several weeks later, Mandamus Order, R. 165, R-App. 11, it is clear it had already predetermined its decision on the motion one day after the motion was filed—presumably because it had predetermined to perform in-camera review *even before* that, without *any* opportunity to consider OSC's arguments. *See* Order Denying Mot. Continuance, R. 82:2 (court denied continuance of January 21st hearing, in part, "[g]iven the likelihood for an *in camera* review"); Recusal Motion, R. 377:7, 9–13.

Similarly, the circuit court issued its final order on the merits *before* the scheduled oral arguments on the merits, Notice of Hearing for March 8, 2022, R. 117; Mandamus Order, R. 165, R-App. 11 (filed March 2, 2022), thereby (1) precluding OSC from presenting the oral argument it expected to make and (2) memorializing its oral predeterminations, *compare* 1/21/22 Hr'g Tr., R. 148:54:16–25, 55:5–7 (rejecting argument that the Mandamus Petition sought remedies not provided by Public Records Law), 55:8–57:10 (rejecting arguments that records were exempted from Public Records Law because Assembly (1) had plenary authority to require OSC to keep records confidential, (2) did so, and (3) did so as part of a proper investigation), 57:11–58:5 (rejecting exemption under No-Disclosure Law), 58:6–21 (rejecting exemption under Wis. Stat. § 19.85),

59:3–14 (rejecting common law exemption), *with* Mandamus Order, R. 165:14–15, R-App. 25–26 (rejecting OSC argument that the Mandamus Petition sought remedies not provided by Public Records Law), 15–21, R-App. 26–32 (rejecting arguments that records were exempted from Public Records Law), 21–25, R-App. 21–36 (rejecting exemption under No-Disclosure Law), 25–26, R-App. 36–37 (rejecting exemption under Wis. Stat. § 19.85), 26–28, R-App. 37–39 (rejecting common law exemption).

OSC raised this, Recusal Motion, R. 377:13 (indicating "J. Remington's conduct" at the 1/21/22 hearing was "sufficient" to show "he had pre-judged [OSC's] credibility, concluding without even an evidentiary hearing that they had no good faith belief that exempting OSC records from disclosure was . . . legally justified"), but the Recusal Supplement does not even claim that these determinations didn't show *pre*determination, opting instead to claim that "OSC does not explain why [he] appeared predetermined . . . ." *Id.* at R. 423:22, R-App. 136.[47] But OSC has demonstrated that the circuit court *made* predeterminations, which is what shows bias; explaining *why* is not required.

b. Predetermination to initiate contempt proceedings.

The circuit court's finding of a *prima facie* showing of contempt was similarly predetermined. AO didn't argue for contempt in its Modify Motion, R. 194, 196; nonetheless, the circuit court found (contradicting its declarations that there would be no findings or conclusions, 4/26/22 Hr'g Tr., R. 324:3:14–15, 19:22–24) that AO had made a *prima facie* case of contempt, and scheduled a hearing. *Supra* Part II.C.1–2. While OSC would ultimately decline to contest this

[47]Although Recusal Supplement also contains arguments in *support* of the predeterminations that were made, see, *e.g.*, *id.* at 423:22–24, R-App. 136–137, the question is not whether the predeterminations are legally supportable, but whether predeterminations—determinations before briefing has been adequately reviewed or even submitted—were made in the first place.

sua sponte prima facie finding (as it was irrelevant because any alleged failure was already cured), the lack of *any* argument by the parties on contempt or establishment of a *prima facie* case shows that Judge Remington predetermined the matter.

Judge Remington's predetermination to find OSC in contempt was first revealed in the March 8, 2020 hearing when he gave AO a roadmap for making a contempt motion for no discernable reason if *not* such predetermination. 3/8/22 Hr'g Tr., R. 182:74:25–75:7. When, however, AO filed its Modify Motion under Wis. Stat. § 806.07(1)(h), Modify Motion, R. 194:2; 196:2, which the court had suggested as an alternative, 3/8/22 Hr'g Tr., R. 182:75:13–15, the circuit court instead *sua sponte* treated AO's motion as one for contempt, the court's original suggestion. So, not only did the circuit court hand AO a roadmap, it then drove AO to a further destination which it had suggested, revealing bias.

So the facts that contempt proceedings were opened without AO requesting it, much less justifying it, and that there was no evidentiary hearing, or even an opportunity for OSC to respond, regarding the *prima facie* case, demonstrate the court's predetermination to put OSC through contempt proceedings. And this was further compounded: while the court took AO's allegations that there must be some unknown documents still missing at face value to establish a *prima facie* case, it continuously failed to consider AO's *concessions* in its Modify Motion that OSC had already produced the missing documents, *id*. at R. 196:5; Affidavit of Christa O Westerberg, R. 198:2 ¶ 5 (Affidavit of AO Counsel in support of its Modify Motion, noting receipt of the 97 pages of documents).

c. Predetermination regarding finding of contempt.

OSC has already set out the facts regarding the circuit court's extraordinary conduct in the June 8 and June 10 hearings, leading up to its finding of contempt, *supra* at 32–34, and has argued that, for several reasons, the Contempt Order, R.

327, R-App. 82, should be overturned because of that. *Supra*. at 60–68. But the court's conduct then also demonstrates a predetermination regarding finding of contempt.

To summarize, in the June 8 hearing on OSC's Quash Motion, R. 255, the circuit court *sua sponte* advised OSC's only witness, Niemierowicz, that, if he testified at the upcoming contempt hearing, the court could "spontaneously" "confine[] [him] in the Dane County Jail," and urged him to get personal counsel. 6/8/22 Hr'g Tr., R. 314:47:4–20, R-App. 251:4–20. Niemierowicz did so and, on advice of his counsel, he did not appear to testify. 6/10/22 Hr'g Tr., R. 322:4:9–5:11, R-App. 256:9–257:11.

Being deprived of its only witness for its case-in-chief, OSC moved for a continuance of the June 10 hearing, which the circuit court denied, *id*. at 322:15:20–21, and then the circuit court found OSC in contempt, "[b]ased on the lack of evidence . . . today," so that OSC "ha[d] not demonstrated that the disobedience of the court order was not intentional." *Id*. at 322:51:3–8.

To any reasonable observer, these events demonstrate, or create the appearance, that the circuit court had predetermined that he intended to find OSC in contempt and that the circuit court created the situation under which the court could do that.

d. Predetermination regarding summary denial of Recusal Motion.

Judge Remington's summary denial of OSC's Recusal Motion was itself, if not an explicit confirmation of predetermination, such a strong appearance of having "prejudged the merits," *Walberg*, 109 Wis. 2d at 108, that it constituted "a serious risk of actual bias." *B.J.M.*, 392 Wis. 2d at 70. The Recusal Motion, and its 40-page Brief in support, Rs. 376, 377, were filed on "the evening of . . . July 15," but the court "could not review the motion *until* . . . *July 18, 2022*[,]" Recusal Supp., R. 423:1 n.1 (emphasis added), R-App. 115 n.1, the same day the Recusal

Order denying the Recusal Motion was filed. Recusal Order, R. 379, R-App. 108. Thus the circuit court could have only spent (at most) a handful of hours to conduct a review of a 40-page brief—including the statutory and case-law cited as well as the months' worth of pleadings, hearings, and orders—and come to an actual determination as to whether there were grounds for recusal. While OSC does not concede that such a feat could have been accomplished, even if it could have, the haste of such a decision certainly constituted an appearance of predetermination.

e. Predetermination regarding pro hac vice revocation and sanctionable conduct.

BLF Attorneys' pro hac vice admissions were revoked, and all OSC Attorneys' conduct was found sanctionable, without notice, hearing, or an opportunity to respond, requirements under both binding precedent and Wisconsin Supreme Court Rules. *Infra* Parts V.B, V.D.5, VI.B, VI.D. While this requires this Court to reverse the circuit's decision, it is also a precise analogue to *Goodson*'s "explicit . . . confirm[ation]" of predetermination, where the "the record demonstrate[d] that the judge in fact had made up his mind *before the . . . hearing*." 320 Wis. 2d at 165–76 (emphasis added).

In sum, the five events described above showed such strong, explicit evidence of predetermination that each, in and of itself, (a) would lead a reasonable observer to conclude that there was bias requiring recusal under the Objective Tests, and (b) could not be overlooked in a true "appearance" determination and would therefore require recusal under the Subjective Test.

2. Totality of the circumstances: Judge Remington displayed bias since initiation of this case.

Without exhausting all examples, the foregoing demonstrate bias requiring recusal. But Judge Remington's bias throughout the case, considering the totality of the circumstances, also requires recusal under the Objective Tests and, because

a true "appearance" determination could not overlook the overwhelming evidence presented by all the facts, under the Subjective Test as well.

a. Judge Remington's subjective bias, and the motive behind it, was revealed in the Recusal Supplement.

Judge Remington fully revealed his bias against OSC, and his motive behind it, in his response to OSC's Recusal Motion, R. 376, 377.[48] In the Recusal Supplement, R. 423, R-App. 114, he spent much ink describing his feelings about OSC, and anything and everyone associated with it, in comments that were often irrelevant to his rulings and the proceedings or shocking in their intemperance and even vitriol. At the end of the Recusal Supplement, the circuit court roundly condemned the work of OSC, which the court said "accomplished nothing," and criticized every aspect of its work. R. 423:88, R-App. 202 (no "weekly progress reports," "gathered no measurable data," "generated no reports," obtained "no [court] relief"). Of course, the public records case before the circuit court did not concern what OSC accomplished and there is little in the record regarding it. But the court's disdain for OSC reveals the subjective motive for its bias: Judge Remington found everything about OSC to be repugnant.

Special Counsel Gableman, for example, received particularly harsh treatment. *See, e.g.*, Contempt Order, R. 327:19–23, R-App. 101–105 (where the court characterized Gableman's testimony and conduct, in the contempt hearing, as "an irrelevant diatribe," "sophomoric innuendo," "baseless," and "misogynistic," and then attributed Gableman's testimony to his intent "to use his appearance to distract from OSC's failure to follow the Court's order, and perhaps to direct

[48]Judge Remington also candidly described "the baseless allegations" in OSC's Recusal Motion as "personal insults," which he claimed he would "ignore." Recusal Supp., R. 423:89, R-App. 203. However, a reasonable observer could conclude that, rather than "ignoring" the "personal insults," Judge Remington retaliated, by revoking the pro hac vice admissions and finding of sanctionable conduct. However, self-reflection would have been the appropriate response, not retaliation.

attention away from his office's illegal records practices.");[49] 8/16/22 Hr'g Tr., R. 438:16:12–18 (where the court, during the purge hearing, referring to the fact that Gableman himself searched all communication devices, disparaged Gableman, stating, "This is coming from a fellow that spent the first couple months in the public library not even owning a laptop," suggesting Gableman was a technological simpleton); *id.* at 438:35:4–16 (where the court suggested, in response to AO's allegation that Gableman's affidavit was not specific enough, that "one of two reasons" is true: either (1) "Mr. Gableman isn't saying everything that he should say" or "didn't do the things" he should have done, or (2) "Mr. Gableman . . . is not capable of conducting a professional and a thorough investigation" and that it is fruitless to "superimpose a level of professionalism on an entity and an individual that just doesn't exist.").

The circuit court's disdain for OSC is also reflected in its ire directed at OSC's arguments, Recusal Supp., R. 423:2, R-App. 116 ("unsupported, illogical, and the outright false," "fiction distilled from the disappointment of a losing party," "a fever dream version of the facts of this case," "a pernicious and selfish attempt to repaint the truth[,] . . . denigrat[ing] our entire unified court system"), 3, R-App. 117 ("frivolous motion," "utterly fails to show any factual reason"), 4, R-

[49]While, in its Contempt Order, the circuit court made much of Gableman's refusal to answer questions, *id*. at 327:20, 24, R-App. 102, 106, what it did not acknowledge was that Gableman was without personal counsel to represent him, so he had to make any objections himself, that he was clearly concerned by the circuit court's perceived threats to witness Niemierowicz that, if he testified in the contempt hearing, he could face spontaneous incarceration, 6/10/22 Hr'g Tr., R. 322:34:2–5, that Gableman's reason for refusing to testify was that, as a result of those perceive threats, he was seeking personal counsel, which he did not yet have, *id*. at 322:35:1–7, 13–16, and that the court agreed that, under the circumstances, Gableman "ha[d] the right to refuse to answer questions[,]" *id*. at 322:36:8–11.

In addition, as a result of the circuit court's view that Justice Gableman's comments and conduct at the hearing were "disruptive and disrespectful," Contempt Order, R. 327:22, R-App. 104, and thereby violated various rules of professional responsibility, *id*. at 327:24, R-App. 106, the court referred the matter to the Wisconsin Office of Lawyer Regulation, *id*. at 327:25(1), R-App. 107. OSC's attorneys here only represent OSC, not Gableman in his personal capacity, and OSC expresses no view on the merits of this referral.

App. 118 ("the tale of an errant judge," "fiction"), 13, R-App. 127 ("literally sophistry"), 75, R-App. 189 ("this page-and-a-half screed"), 88, R-App. 202 ("baseless arguments"), 89, R-App. 203 ("baseless accusations at the public's expense," "new accusations of a kind of self-serving defensiveness," "personal insults"), and OSC's attorneys, *id*. at 3, R-App. 117 ("the motion to which [OSC's attorneys] have signed their names applies phony legal principles to invented facts," "[n]ear every claim they make is frivolous," "frivolous motion"), 13, R-App. 127 ("carelessness with which OSC [attorneys] ha[ve] drafted this fiction"), 86, R-App. 200 ("the brief authored by those lawyers is a manifestation of incompetency because it applies phony legal principles to invented facts"), 87, R-App. 201 ("[OSC attorneys] rely on obvious logical fallacies," "ignore Wisconsin law and take offense when confronted with it," "ignore the facts of record, or, worse, substitute their own legal arguments as those facts"). Judge Remington's disdain for OSC, which led the court to denigrate OSC, its representatives, its arguments, and its counsel, demonstrates Judge Remington's subjective motive for bias against OSC.

Of course, the negative publicity generated by Judge Remington's statements, conduct, and actions against OSC was not limited to the public's knowledge of these public proceedings. Instead, his conduct generated numerous headlines, negative to OSC, in widely-read publications.[50] Thus, a reasonable

[50]*E.g.*, *Judge Fines Gableman, Refers Him to OLR for 'Unprofessional Behavior'*, WISPOLITICS (June 16, 2022), https://www.wispolitics.com/2022/judge-fines-gableman-refers-him-to-olr-for-unprofessional-behavior; Mitchell Schmidt, *Judge Offers Scathing Review of Michael Gableman's Courtroom Behavior, Fines Former Justice $2,000 a Day for Contempt*, WISCONSIN STATE JOURNAL (June 16, 2022), https://madison.com/news/local/govt-and-politics/judge-offers-scathing-review-of-michael-gablemans-courtroom-behavior-fines-former-justice-2-000-a/article_8a87977b-caff-5c44-a34a-40ba418070fc.html; Bejamin Yount, *More Criticism for Gableman, His Investigation*, THE CENTER SQUARE (Aug. 16, 2022), https://www.thecentersquare.com/wisconsin/more-criticism-for-gableman-his-investigation/article_3d42d114-1d9d-11ed-92a5-438e323ed075.html; Lawrence Andrea, *'Accomplished Nothing': Judge Admonishes Michael Gableman's 2020 Election Review, Bars*

observer could conclude that, because of Judge Remington's disdain for OSC, he had a publicity-generating goal to undermine public support for OSC. And this was likely the result.

Finally, the Recusal Supplement, R. 423, R-App. 114, itself in total puts the circuit court's bias on full display. As explained, relying exclusively on a court's subjective judgement of his bias is untenable, since "the more biased the target judge is, the less likely that the judge is to recuse himself." *Recusal Procedure* at 1170. But the more biased a judge is, the more likely it is also that he will fail to recognize his own biased behavior. *Id.* at 1176, 1179 ("Judges . . . like all other humans, [] suffer from cognitive biases that disable them from assessing their own impartiality."); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 242, 277 (1987) ("A bizarre rule calls on the very judge whose acts are alleged to be warped by unconscious bias to decide whether there is an adequate showing of bias. . . . The most biased judges may be the most

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Lawyers from Case, MILWAUKEE JOURNAL SENTINEL (Aug. 17, 2022), https://www.jsonline.com/story/news/politics/2022/08/17/judge-admonishes-michael-gablemans-2020-review-wisconsin-election/10346689002/; Rob Mentzer, *Judge Revokes Ex-Gableman Attorneys' Right to Represent 2020 Election Inquiry*, WISCONSIN PUBLIC RADIO (Aug. 17, 2022), https://www.wpr.org/judge-revokes-ex-gableman-attorneys-right-represent-2020-election-inquiry; Marisa Wojcik, *Gableman Referred to Wisconsin's Office of Lawyer Regulation*, PBS WISCONSIN (June 17, 2022) https://pbswisconsin.org/news-item/gableman-referred-to-wisconsins-office-of-lawyer-regulation/; Todd Richmond, *Judge Rebukes Gableman Probe, Ends Contempt of Court Order Over Open Records,* PBS WISCONSIN (Aug. 17, 2022), https://pbswisconsin.org/news-item/judge-rebukes-gableman-probe-ends-contempt-court-order-over-open-records/; Henry Redman, *Dane Co. Judge Suggests Gableman's Lack of Professionalism May Leave Questions Unanswered,* WISCONSIN EXAMINER (Aug. 16, 2022), https://wisconsinexaminer.com/2022/08/16/dane-co-judge-suggests-gablemans-lack-of-professionalism-may-leave-questions-unanswered/; Associated Press, *Judge Accuses Gableman of 'Unprofessional and Misogynistic Conduct'*, WISN 12 (June 15, 2022), https://www.wisn.com/article/judge-accuses-gableman-of-unprofessional-and-misogynistic-conduct/40302210#; Henry Redman, *Dane Co. Judge Revokes Election Probe's Attorney's Ability to Practice in Wisconsin*, WISCONSIN EXAMINER (Aug. 17, 2022), https://wisconsinexaminer.com/2022/08/17/dane-co-judge-revokes-election-probes-attorneys-ability-to-practice-in-wisconsin/.

persuaded that their acts are just."). The Recusal Supplement displays this lack of self-awareness.

In its 90 page supplemental response to OSC's Recusal Motion, R. 376, 377, the court not only resorts to argument by adjective and accusation, but found not one time when the court harmfully misspoke, made an ambiguous statement, deviated in the slightest from legal norms or the factual record, or provided a scintilla of evidence of bias. *See generally* Recusal Supp., R. 423, R-App. 114.[51] OSC believes that a reasonable observer would view it quite differently.

All of the foregoing, particularly in light of the totality of the circumstances, shows bias requiring recusal under all tests.

b. Threatening OSC's sole witness (and then hiding it by omission and with ellipses) and denying continuance when OSC's witness didn't appear demonstrated bias.

OSC has already explained the facts of the June 8 and June 10 contempt hearing, *supra* pp. 32–34, how that incident justifies setting aside the court's contempt finding, *supra* Parts II and III, and how it demonstrates predetermination bias, *supra* pp. 97–99. However, these events were merely the coup de grâce in a series of events that would lead a reasonable observer to conclude that throughout the entire case, Judge Remington had displayed apparent or actual bias requiring him to recuse.

c. Guiding and directing AO and making arguments and motions on its behalf reveals bias.

The circuit court stated that "[t]here is no evidence that [he] favored one party over the other." Recusal Supp., R. 423:17, R-App. 131. However, the record discloses that the circuit court repeatedly directed AO on how to prosecute its case,

[51]For instance, in reviewing the allegations of bias in the Recusal Supplement, Judge Remington claimed 51 times that there was "no evidence" of bias.

provided arguments for AO, made motions for AO, called witnesses and conducted direct examination for AO, and aided AO in other inappropriate ways.

The first example of this was at the very beginning of the case, when Judge Remington provided detailed step-by-step instructions to AO for how to effectuate service, resolving a jurisdictional issue. At the January 21, 2022 hearing, OSC argued that the court lacked jurisdiction over OSC due to lack of service. 1/21/22 Hr'g Tr., R. 148:8:10–10:16. The court erroneously characterized this dispute as a factual one, *supra* n.7, set a hearing for January 27, and required Gableman to testify. *Id*. at 148:11:7–12:13. The court then instructed AO how to spring the trap the court set: "If Mr. Gableman appears in the Dane County Circuit Courtroom, . . . please be prepared for the real possibility that Ms. Westerberg will bring a process server and serve him on the 27th." *Id*. at 148:12:14–18. Caught in what the court itself acknowledged as a "[catch] 22 position," *id*. at 148:12:19, OSC subsequently accepted service, Confirmation of Acceptance of Service, R. 116.

While the transcript suggests that the circuit court was addressing OSC Attorneys, the video of the hearing shows the opposite: Judge Remington was frequently looking at AO counsel with wry expression, *see, e.g.*, Wisconsin Eye video of 1/21/22 Hr'g ("**1/21/22 WisEye**"), https://wiseye.org/player/?clientID=2789595964&eventID=2022011043&startStreamAt=986, 16:26–16:32,[52] giving the appearance of giving step-by-step instructions to AO's counsel. *Id.* at 16:00–17:14. Of course, this *did* put OSC in a "catch-22," forcing it to either concede jurisdiction or to be served at a required appearance.

[52]OSC cites to both the transcript and to video replays available on Wisconsin Eye because, as the circuit court recognized, a transcript "does not tell the whole story[,]" Contempt Order, R. 327:20, R-App. 102, such as Judge Remington's negative tone and demeanor, reflecting bias.

So Judge Remington both guided AO on achieving service and produced a hearing within the service timeframe, that would achieve no purpose *except* service. That this was precisely his intent is confirmed by the fact that, after setting the hearing date, he looked at AO counsel and said, "You can figure out what your next move is," *id.* at 17:38–17:42; R. 148:13:18–19, just before plainly stating the court's desire to eliminate the non-"fundamental question" of jurisdiction: "I would rather . . . limit the [] contested issues, and just move forward to the basic fundamental question of the propriety of the custodian's response to the public records request made,"[53] 1/21/22 WisEye, https://wiseye.org/player/?clientID=2789595964&eventID=2022011043&startStreamAt=1061, 17:41–17:59; R. 148:13:19–23. Although a less explicit, "wink-and-nod" exchange would have been prejudicial enough, there can be no question that this *direct* "next move" suggestion, with the *direct* indication that the circuit court didn't wish to concern itself with well-founded objections, advised AO on how to proceed with its case while ignoring legally substantiated contentions. The evidence of bias apparent in such acts of guidance—weighty enough by far on its own—is doubly ballasted: first, by the generation of a hearing with no purpose other than to facilitate service by AO or to force OSC to accept service and, second, by the rejection of the notion that jurisdiction is a fundamental issue.

Second, OSC has already explained the instance when the circuit court assisted AO with a roadmap on contempt and then, after erroneously converting AO's Modify Motion, Rs. 194, 196, to one for contempt, found it had made a *prima facie* case. *Supra* pp. 32, 68–70, 97–99.

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[53]Jurisdictional objections arising from service failure *are* fundamental. *Bergstrom v. Polk Cty.*, 2011 WI App 20, ¶ 12, 331 Wis. 2d 678, 685–86, 795 N.W.2d 482, 486 (Ct. App. 2011) ("'Wisconsin requires strict compliance with its rules of statutory service,'" and "failure to properly serve a defendant is a *fundamental* defect fatal to the action," resulting in "dismissal of the plaintiff's complaint." (emphasis added) (citations omitted)). There is little explanation, if not bias, for the suggestion that it is not.

Judge Remington also repeatedly provided arguments for AO. For instance, in the January 21 hearing, he told AO's attorneys, "I'd like to hear from you whether you agree with me that the time has passed for coming up with new reasons [for exemption from the public records law]." 1/21/22 Hr'g Tr., R. 148:64:2–3. In the same hearing, he supplied arguments to AO regarding (**1**) whether all required documents had been produced, *id.* at 148:20:15–21:1, and (**2**) the nature of AO's Petition, *id.* at 148:54:22–25.

The circuit court created numerous additional arguments *sua sponte*. For example, in the March 8 hearing, the court asked AO attorneys, "Do you believe that if the Court accepts Mr. Bopp's argument . . . that Mr. Gableman is a prosecutor . . . [then he] is not conforming himself to the ethical standards that would apply to prosecutors?" 3/8/22 Hr'g Tr., R. 182:34:13–21. AO had not made this argument and said it hadn't. *Id.* at 182:35:7 ("We've not researched that[.]"). Rather, the circuit court used AO's mention of OSC's public statements as a basis to, *sua sponte*, make arguments *for* AO. And, again, Judge Remington put *his* argument in AO's mouth, claiming that he "thought" AO was arguing Gableman was violating the Supreme Court rules on prosecutorial ethics, *id.* at 182:36:17–37:8, even though AO had not even *hinted* at such an argument.[54] *See generally id.* at 182:29:18–37:19. This is doubly troublesome because OSC also never argued that Gableman was a prosecutor, but the opposite, *id*. at 182:17:19–21 ("And there may be people who are in the position of an investigator *not working for a prosecutor*, such as [OSC]." (emphasis added)).

[54]AO yet again stated plainly that this *sua sponte* argument by the court was *not* something it had considered: "I was thinking even a different level than—I think that's all true. Our point in referencing some of these public statements is to point out . . . two things . . . ." *Id.* at 182:37:9–12. Neither of these "two things" concerned the ethical duties of prosecutors. *Id.* at 182:37:12–38:17.

The circuit court during the June 8 hearing also suggested that AO make the argument that OSC was potentially in contempt for not providing AO documents in their original, native digital format, suggesting AO's requests had specified that format, 6/8/22 Hr'g Tr., R. 314:13:9–11, 31:21–33:5, which the court interpreted as "in the *native* format, digital or electronic," *id*. at 314:36:17 (emphasis added), which AO never required. Columbo Affidavit Ex. B., R. 8:5 (AO document request, requesting "responsive material in native format *or* in PDF format." (emphasis added)). The circuit court argued repeatedly that not producing requested documents in native digital format[55] could be contemptuous, 6/8/22 Hr'g Tr., R. 314:13:12–15, 37:4–12, 39:16–24, and suggested to AO that it make that argument. *Id*. at 314:32:22–33:5.[56]

During the same hearing, OSC argued its motion to quash AO's subpoena of Gableman. *See generally* 6/8/22 Hr'g Tr., R. 314:5:18–46:13; Quash Motion, R. 255; Subpoena of Gableman, R. 256:3–4. The circuit court had ordered that the parties have their "Witness Lists . . . filed by May 10," prohibiting the testimony of witnesses not designated "except for good cause shown." Scheduling Order, R. 208. AO did not submit a witness list and thus had not named Gableman as a witness, *see* 6/8/22 Hr'g Tr., R. 314:5:7–13, nor subpoenaed him until June 5, 2022. Opp'n to Mot. Quash, R. 299:4. Although AO argued that the witness list requirement applied only to OSC, *id.* at 299:6, OSC noted that the Scheduling Order, R. 208, required "lists" (plural), not only one from OSC. 6/8/22 Hr'g Tr., R.

[55]During the entirety of the hearing, the circuit court mentioned the "digital" or "electronic" form with the clear, erroneous implication that these terms meant the *original*, *native* format, *id.* at 314:31:21–23, 36:16–1, at least 10 times. *See id.* at 314:36:17, 37:12, 39:10 ("electronic"); 13:11, 13:15, 31:23, 32:6, 33:1–5, 33:14–15, 36:17 ("digital").

[56] Although AO had, after asked whether it had requested "original" format, *id.* at 314:31:21–23, advised the circuit court it had only requested "electronic" format, *id.* at 314:31:24–32:3, the court nonetheless *again* nudged AO to take up this argument: "[I]f that's true, which I believe it is, does American Oversight still desire to receive electronic or digital responses to its original public records request?" *Id.* at 314:32:4–7.

314:12:2–19. But despite acknowledging this was correct, *id.* at 314:27:24–25, Judge Remington nonetheless denied OSC's Motion to Quash Subpoena, *id.* at 314:46:9–13, and, less than 48 hours before the June 10 hearing, long since OSC had developed trial strategy, stated he would have granted AO's motion to amend anyway if AO had brought one, which it didn't, *id.* at 314:45:14–19. Thus, Judge Remington demonstrated bias by, despite *acknowledging* OSC "interpret[ed] . . . the Court's form order correctly," *id.* at 314:27:24-25, allowing a deviation from that order that was extremely prejudicial to OSC and extremely advantageous to AO.

d. Misstating evidence to the detriment of OSC demonstrates bias.

Throughout the case, Judge Remington frequently misstated evidence to the detriment of OSC.

Following the filing of special notices of appearance reserving jurisdictional objections, Notice of Appearance, Rs. 49, 65, OSC moved for a brief continuance of the January 21st hearing on January 18, 2022, advising the circuit court that AO had not effected personal service. Motion for Order to Continue Return Date, R. 80. Judge Remington denied the continuance, misstating that OSC had filed its motion only 24 hours before the January 21, 2022 hearing. Order Denying Motion for Continuance, R. 82:2 ("Filing a motion for a continuance 24 hours before the date set by the Court for a response is untimely."). Rather than acknowledge his error, in an effort to prove he didn't misstate the evidence, Judge Remington *again* misstates evidence, thus creating a meta-misstatement. He claimed that: "[A]s will frequently be the case, I did not say what OSC says I did,"[57] Recusal Supp., R. 423:10, R-App. 124. Yet, he *did* say that OSC filed the brief 24 hours before,

[57]In doing so, the court took the opportunity, based on his misstatement, to once more denigrate OSC and its attorneys.

Order Denying Motion for Continuance, R. 82:2, even though the hearing was actually three days after OSC filed its continuance motion, as its file stamp clearly indicates, R. 80.

This is one example, shocking for the doubling-down by the circuit court for no discernable reason if not to baselessly denigrate OSC, of its continuous mischaracterizations of OSC's and its own words. One of the most egregious instances is the circuit court's omitting and deleting, via ellipses, its "incarceration" language in the June 8 hearing which led to OSC losing its only witness for the June 10 contempt hearing. *Supra* p. 24.

The circuit court also incorrectly claimed that OSC's concession of failing to produce certain documents was "only made today [6/8/22]," 6/8/22 Hr'g Tr., R. 314:20:8, when in fact OSC had made the concession in its May 13 Modify Opp'n. R. 225:7 n.9. Additional examples of misstatements of evidence are noted throughout this brief. *See, e.g.*, *supra* p. 109 (discussing court's repeated incorrect insistence that AO had requested native format documents); *supra* pp. 33–34 (discussing court's claim that OSC had "refused" to present evidence at contempt hearing, when it had repeatedly made clear it was *unable* to present evidence); *supra* pp. 71–73 (discussing court's suggestion of "spontaneous" incarceration, although caselaw requires granting hearing); *supra* pp. 76–78 (discussing numerous misstatements of Niemierowicz deposition); *supra* n.26 (discussing circuit court's alteration, in its Mandamus Order, of OSC's original response to AO's records requests).

Examples of misstatements of fact also similarly abound in the Recusal Supplement. This is of particular importance, because the Recusal Supplement's premise that the Recusal Motion's claims were "unsupported, illogical, and the outright false" was a significant basis of the court's conclusions. Recusal Supp., R.

423:2, R-App. 116. If, then, in purporting to describe each of the Recusal Motion's supposed inaccuracies, the Recusal Supplement misstates the record, it is impotent.

This is precisely the case. Some of the Recusal Supplement's misstatements of fact are discussed elsewhere in this Brief (*e.g.*, *supra* pp.110–111 (section noting "meta-mistatement"); *infra* p. 126 (discussing inexplicable denial of calling arguments "strawman arguments" and "misstatements and exaggerations," right before quoting himself as referring to arguments just so)).

For the sake of brevity, OSC offers only two additional examples. First, in yet another transformation-via-ellipses, the circuit court states that OSC claimed, regarding a motion for continuance, that it "'delayed filing . . . per local rules'" the motion for continuance. Recusal Supp., R. 423:10, R-App. 124 (quoting Recusal Motion, R. 377:5). OSC's actual claim, transformed by the court through ellipsis, concerned its having "delayed filing *due to unavailability of AO counsel on the 1/17/22 holiday to discuss resolution* per local rules." Recusal Motion, R. 377:5 (omitted portion in italics).[58] The circuit court used its version to claim OSC referred to a non-existent rule. Recusal Supp., R. 423:10, R-App. 124. Again, there was little reason for the transformation of this quote by ellipsis except to tarnish OSC and its attorneys.

Second, one section of the Recusal Supplement contains two misstatements a mere four lines apart. Judge Remington claims OSC (a) falsely attributed a quote to him, "I wasn't talking to you [Attorney Dean]"—and (b) was incorrect to posit he *had* addressed Attorney Dean. *Id*. at 423:65–66, R-App. 179–180. But OSC had alleged only that the judge "in essence" said he was not talking to Attorney Dean,

[58] Local rules require such discussion: "Lawyers shall make all reasonable efforts to reach informal agreement on preliminary and procedural matters . . . ." Code of Professional Responsibility, Courtesy & Decorum for the Circuit Courts of Dane County, Rule 8, available at https://courts.countyofdane.com/prepare/rules. *See also* Dane County Local Rule 304 (requiring "written consent" for continuances), available at https://courts.countyofdane.com/documents/Complete-Court-Rule-List-for-Web.pdf.

Recusal Mem., Doc. 377, 32, and the record cited there by OSC, 6/10/22 Hr'g Tr., R. 322:31:8–21, shows that he did just that—responding to a statement by Attorney Dean by saying, "I'm talking to Mr. Stadler here this morning"—and that he *had* just addressed Attorney Dean at the same time ("Mr. Stadler, and to the extent you join in that motion, Mr. Dean . . . ."). Both of the circuit court's statements were plainly in contradiction of this record. The circuit court concluded its discussion of this matter by stating, again denigrating OSC and its attorneys, "I once again decline to respond further, except to once again note the astounding waste of public resources in the drafting of allegations like this." Recusal Supp., R. 423:66, R-App. 180. These many examples show the *continuing* demonstration, in the Recusal Supplement, of the circuit court's bias.

e. Judge Remington demonstrated bias in other ways.

The circuit court exemplified its bias in numerous other ways throughout the proceedings that do not fit into the above categories.

i. Judge Remington stonewalled OSC efforts to make its record.

The circuit court often bucked against—or wholly prevented—OSC's efforts to make its record, such that counsel had to "choose between [advocating] and obtaining a fair trial," *Walberg*, 109 Wis. 2d at 108–09. One example, discussed above, is Judge Remington's claim that he was not talking to Attorney Dean (thus preventing him from arguing that a motion to dismiss had been made in writing), despite having *directly* addressed Attorney Dean in his immediately preceding question. *Supra* pp. 112–113. And another example occurred after the Recusal Motion was filed, where the circuit court called an OSC attorney's description of a witness's *perception* of a threat, from the court's comments about incarcerating him if he testified at the June 10 hearing on contempt—a perception of grave import in this case—potentially sanctionable, 8/16/22 Hr'g Tr., R. 438:13:12, stating, "I'm going to . . . put [that representation] to rest," *id.* at

438:13:14–15, thus *explicitly* telling OSC's attorney not to describe the effect of the circuit court's language on OSC's sole witness.

OSC Attorneys were often made to take near-Sisyphean efforts to make a record. In the April 26 hearing alone, for example, this occurred more than once. The first instance began when an OSC attorney answered a question the circuit court had asked, 4/26/22 Hr'g Tr., R. 324:6:2–7:8, then attempted to clarify but was not permitted to speak. *Id.* at 324:8:4–8:10. Upon asking again to be heard, *id.* at 324:16:12–16:15; *see also* Wisconsin Eye video of 4/26/22 Hr'g ("**4/26/22 WisEye**"), https://wiseye.org/player/?clientID=2789595964&eventID=2022041063&startStreamAt=1194, 19:54–20:19, the circuit court gave no regard to what the attorney had to say, appearing hesitant to permit him to even address a question that had been asked to him, 4/26/22 WisEye, https://wiseye.org/player/?clientID=2789595964&eventID=2022041063&startStreamAt=1217, 20:17–20:19 (Judge Remington looks away and hesitantly says, "Okay"). When the OSC attorney began his clarification, he was not allowed to complete it, as the circuit court muted his microphone. 4/26/22 WisEye, https://wiseye.org/player/?clientID=2789595964&eventID=2022041063&startStreamAt=1219, 20:19–21:08; 4/26/22 Hr'g Tr., R. 324:16:9–17:9 (transcript parallel to foregoing video citations). Once the OSC attorney *was* allowed to finish explaining his objection to a temporary order being extended beyond a temporary period, the circuit court, in an incredulous tone, suggested that there was no good faith argument supporting such an objection: indicating no reply would be needed (thus again showing predetermination by clearly indicating, *without even seeing OSC's response*, AO would not need to defend its position), the court denigrated the upcoming response, "I'll see what [OSC] tries to explain as to why my order does anything other than reiterate what the statutes already apply." *Id.* at 324:18:7–10; *see also* 324:19:13–17 (giving "very short turnaround . . . because I am completely unaware

of what objection [OSC] should make as to whether it's obligated to comply with the law in Wisconsin . . . ."). Thus, the circuit court almost entirely prevented the OSC attorney from making his objection, in addition to the predetermination shown.

This is not the only time in this hearing alone that the circuit court erected such barriers to advocacy. When an OSC attorney later attempted to be heard regarding scheduling, he had to make *four* separate pleas to be permitted to make his record. After an earlier unsuccessful attempt (addressed below), the OSC attorney's second attempt resulted in a curt response, which simply assumed that he was asking to speak to something other than scheduling, *id.* at 324:19:21–24, even though he requested to be heard immediately after the circuit court had spoken thereon. *See id.* at 324:19:13–17. Then, when he clarified that the schedule was what he wanted to address, *id.* at 324:19:25—his third attempt to do so—the circuit court responded that: "I've already set the schedule[,]" *id.* at 324:20:1. That scheduling discussion began less than three minutes before the OSC attorney asked to be heard,[59] but even that does not make clear how concretely this showed bias: during the whole duration of this brief time frame, the circuit court was *continuing* to speak about the scheduling, culminating in its comment (directly related, still, to that scheduling), "I don't think you need much time." *Id.* at 4/26/22 WisEye 22:24–24:48. So the request was timely made *immediately* after the circuit court finished speaking on scheduling. And if this were not enough, the record indicates he *did* try to make his objection (his first attempt) *immediately* after the circuit court first announced this scheduling order, stating "Your—", while shaking his head after looking down (presumably at his schedule), but being

[59] *Compare* 4/26/22 WisEye, https://wiseye.org/player/?clientID=2789595964&eventID=2022041063&startStreamAt=1335, 22:15–22:24 (circuit court: "Have your response to the Court's language in the temporary order filed by this Friday") *with id*. at 24:53–54 (OSC attorney: "Can I be heard?").

unable to complete the phrase, "Your Honor" as the circuit court continued (he perhaps recalled he had been muted by the circuit court when he attempted to finish a sentence). 4/26/22 WisEye, https://wiseye.org/player/?clientID=2789595964&eventID=2022041063&startStreamAt=1335, 22:15–27; *see* 4/26/22 Hr'g Tr., R. 324:18:3–7.

Thus, it was only upon his *fourth* plea to be permitted to make a timely objection, "[P]lease, Your Honor. I'm entitled to make my objections," 4/26/22 Hr'g Tr., R. 324:20:3–4, that he was permitted to do so, *id.* at 324:20:5–6. Absent this final, explicit appeal to the fact that objections are permitted, OSC would *not* have been afforded the ability to make its record.

While these are not the only examples, *see, e.g.*, 1/21/22 Hr'g Tr., R. 148:53:25–54:1 (OSC attorney imploring the circuit court "to permit [him], for the purposes of the record, to make [his] objection," after the circuit court had cut him off, inexplicably referring previously to his objections as a "politic[al]" "closing argument," *id.* at 148:52:10–15), they are demonstrative of the lengths the circuit court made OSC go to make its record.

ii. Judge Remington erroneously admitted evidence.

OSC has already described Judge Remington's erroneous admission of evidence when that evidence harmed OSC. *Supra* pp. 74–77 (describing admission of deposition and improper authentication of evidence).

iii. Judge Remington used demeaning language.

Throughout the proceedings, Judge Remington expressed hostility toward OSC and its investigation using demeaning language. *See, e.g.*, 8/16/22 Hr'g Tr., R. 438:36:6–13 (suggesting "the investigation didn't occur and it was just simply window dressing" (although framed as an "alternative," the context makes clear he was suggesting it was the more likely alternative—and regardless, option two was equally negative, that documents were not produced by the time of the purge

hearing, *id.* at 438:35:2–13)); Mandamus Order, R. 165:10 n.5, R-App. 21 n.5, (similarly, "Nothing in these particular records bespeaks any investigation at all, let alone one demanding strategic secrecy."); *id.* at 165:29, R-App. 50 (same sentiment); 6/8/22 Hr'g Tr., R. 314:46:14–48:20, R-App. 250:14–252:20 (suggesting possibility that OSC had, in designating Niemierowicz as sole witness to testify about the document search, set him up as a scapegoat, despite fact that he was the individual who actually performed the initial search).

Not even such minor matters as typos escaped the circuit court's attention. No less than four times, Judge Remington pointed out a minor, easily missed typo, "held," misspelled as "help," in an email sent by OSC in response to AO's records requests. Mandamus Order, R. 165:1, 49, R-App. 12, 60; 1/21/22 Hr'g Tr., R. 148:33:25–34:6, 45:13–16. Although the circuit court framed one of these instances as an example of how OSC's response were "unconsidered," even the most professional individuals, in documents of grave import, make typos,[60] demonstrating not lack of consideration, but simple humanity. It is therefore difficult to imagine any purpose for this aside from denigrating OSC and its employees, reflecting bias.

3. The totality of the circumstances demonstrates actual and apparent bias.

Although it is impossible to discern how gravely the totality of these circumstances, with countless strands of bias being woven together throughout the proceedings, adversely affected OSC, the totality certainly demonstrates actual bias. And even if this Court should find they do not, it should find that they

[60]For example, Judge Remington misquoted OSC, using "there" for "three." *Compare* Recusal Supp., R. 423:81, R-App. 81 ("OSC asserts that '*[t]here* separate sources govern recusal . . . '" (emphasis added)) *with* Recusal Motion, R. 377:2 ("*Three* separate sources govern recusal . . . ." (emphases added)).

"reveal[] a great risk of actual bias," and thus required recusal. *Goodson*, 320 Wis. 2d at 175 (citation omitted).

The circuit court *did* engage in explicit predeterminations of the sort that *does* constitute actual bias under *Goodson. Id.* at 176. And none of these "actual bias" events stand alone. That is, each of the five categories of behavior discussed above contains numerous examples of actual or apparent bias. When viewed as a whole, considering the totality of the circumstances as required, these numerous demonstrations of bias required recusal under both the Objective Tests and Subjective Test.

This Court should therefore find that Judge Remington erred in failing to find that his actual bias—precisely the same type of bias that *Goodson* called "definitive evidence of actual bias," *id*.—and his behavior which, when considered with the totality of the circumstances, presented a serious risk of actual bias, required his recusal under the Statutory Objective Test and under the SCR Test applicable to the fair trial doctrine. It should also find that, because Judge Remington failed to properly analyze the true facts and allegations of the case and apply the controlling law that defines bias, "no one can conclude from . . . [his] [Recusal Order or Supplement], that the [judge] has made the required subjective determination . . . " of lack of bias. *Ozanne*, 822 N.W.2d at 71 (Abrahamson, C.J., op.).[61]

Indeed, the circuit court flatly denied the need to consider whether the *totality of the circumstances* required recusal. Recusal Supp., R. 423:84–85, R-App. 198–199. But this Court need not remand the issue to Judge Remington to

[61]Although Judge Remington *does* claim, regarding two particular arguments, that OSC had not shown an appearance of bias, Recusal Supp., R. 423:15, 22, R-App. 129, 136, he generally declines to make an "appearance" determination regarding any others, and indeed does not even make a subjective determination in his final analysis. *Id*. at 423:85, R-App. 199 (no mention of whether he created an impermissible appearance of bias). As noted, the Recusal Order similarly failed to properly determine this matter.

cure these flaws in his "determination." Because recusal clearly *was* required, this Court should so find and, as a result, vacate the circuit court's Mandamus Order, R. 165, R-App. 11, Order Denying Stay, R. 177, R-App. 64, Contempt Order, R. 327, R-App. 82, Recusal Order, R. 379, R-App. 108, Recusal Supp., R. 423:2–3, 86–90, R-App. 116–117, 200–204 (order revoking pro hac vice admissions and finding sanctionable conduct), Purge Order, R. 424:3, R-App. 208 ($24,000 sanction), and Judgment, R. 497, R-App. 319 ($1,000 in punitive damages). If any issues remain, this court should remand to a different judge for determination.

V. The circuit court erred in revoking the pro hac vice admissions of five BLF Attorneys.

The circuit court's revocation of the pro hac vice admissions of the five BLF Attorneys, based on what the circuit court considered a "frivolous motion" to recuse, Recusal Supp., R. 423: 2–3, 86–90, R-App. 116–117, 200–204, was erroneous and unwarranted. *See* SCR 10.03(4)(e). Accordingly, the court's revocation should be vacated and BLF Attorneys' pro hac vice admissions reinstated.

A. Standard of Review

The standard of review of a circuit court's decision to revoke the pro hac vice admission of an attorney is abuse of discretion. *Filppula-McArthur v. Halloin*, 2001 WI 8, ¶ 31, 241 Wis. 2d 110, 128, 622 N.W.2d 436, 443 (2001). A reviewing court "will find no erroneous exercise of discretion if the record shows that the circuit court reached a reasonable conclusion after application of the law to the relevant facts." *Id*. at 128 (citation omitted).

B. Legal Standard

SCR § 10.03(4)(e) governs revocation of pro hac vice admissions, providing:

> A court or judge may, after hearing, rescind permission for a nonresident counsel to appear before it if the lawyer by his or her conduct manifests incompetency to represent a client in Wisconsin court or unwillingness to abide by the rules of professional conduct for attorneys or the rules of decorum of the court.

C. This issue is not moot.

While this case is on appeal and not currently proceeding in the circuit court, the revocation of BLF Attorneys' pro hac vice admissions is not moot because such revocation is significantly damaging to them and has "continuing, adverse collateral consequences for [their] careers." *Ford Motor Co. v. Young*, 322 Ga. App. 348, 352 (Ga. Ct. App. 2013). First, if any part of this appeal is remanded to the circuit court, BLF Attorneys will not be able to participate. Second, the revocation of their pro hac vice admissions can negatively affect their ability to appear in other Wisconsin courts. *Filppula-McArthur*, 241 Wis. 2d at 133–34 (allowing a judge to rely on a pro hac vice revocation in a different court to justify denial of pro hac vice admission in their court). Third, such revocation negatively affects BLF Attorneys' reputations and careers.

D. Revocation of BLF Attorneys' Pro Hac Vices was unjustified.

1. Revocation was unjustified because BLF Attorneys have consistently demonstrated competency and a willingness to abide by the rules of professional conduct and decorum.

The circuit court claims that revocation was proper because (**1**) BLF Attorneys' Recusal Motion, Rs. 376, 377, was "frivolous" and demonstrated incompetency, Recusal Supp., R, 423:3, 86, R-App. 117, 200,[62] (**2**) counsel "demonstrate[d] unwillingness to abide [by] the rules of professional conduct," *id*. at 423:87, and (**3**) counsel "demonstrated unwillingness to abide by the rules of decorum[,]" *id*.

[62]Surely, competency should generally be based on more than one motion. In this case, OSC Attorneys filed at least 14 briefs totaling nearly 200 pages (not including numerous motions). The circuit court only claimed "incompetence" in one brief totaling 40 pages.

On the contrary, the Recusal Motion was not frivolous and BLF Attorneys have continuously demonstrated competence and have abided by the rules.

a. The Recusal Motion was not frivolous.

As demonstrated above, *supra* Part IV, and below, *infra* Part VI, OSC's Recusal Motion was not frivolous, but based on a good faith arguments on the facts and the law.[63]

b. BLF Attorneys have continuously shown competency.

Competence means "provid[ing] competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." SCR 20:1.1. While there are myriad cases describing incompetence, none of them are analogous here. Accordingly, the ABA comments provide important guidance.[64] The relevant factors to determine "whether a lawyer employs the requisite knowledge and skill in a particular matter" include the following:

> the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner.

SCR 20:1.1, ABA Comment [1]. Thoroughness and preparation requires "inquiry into and analysis of the factual and legal elements of the problem, and use of

[63]While BLF attorneys recognize that they are ethically responsible to never file any brief, or make any argument, that is frivolous, it is noteworthy that the circuit court only complains about one brief, the one that directly relates to him.

[64]"The [ABA] comments . . . are published in the Supreme Court rules and while not adopted 'may be consulted for guidance in interpreting and applying the Rules of Professional Conduct for Attorneys.'" *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc*., 2011 WI 36, ¶ 97 n.74, 333 Wis. 2d 402, 451 n.74, 797 N.W.2d 789, 813 n.74 (2011) (quoting Wisconsin Comment to SCR ch. 20 Preamble).

methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." *Id*. at ABA Comment [5].

Ironically, while making the blanket statement that the Recusal Motion showed no "legal knowledge, skill, thoroughness [or] preparation." Recusal Supp., R. 423:86, R-App. 200 (quoting SCR 20:1.1), the circuit court failed to discuss any of the factors, suggested by the ABA, as relevant to determining whether BLF Attorneys had the requisite competence. When properly applied, all factors make clear that BLF Attorneys have at all times met the competency requirements.

i. BLF Attorneys have the requisite knowledge and skill.

First, a public records lawsuit is not relatively complex or specialized, so no specialized knowledge or training is necessary. Nevertheless, second, BLF Attorneys have significant training and experience. Attorney Bopp's career spans over 49 years. Attorneys Milbank and Maughon have both been practicing for eight years. And while Attorneys Dougherty and Massie are relatively new attorneys, "[a] newly admitted lawyer can be as competent as a practitioner with long experience[,]" SCR 20:1.1, ABA Comment [2], and both attorneys have associated with experienced counsel.[65]

The Bopp Law Firm's practice involves numerous and complex legal issues and matters, specializing in the areas of constitutional law, First Amendment law, campaign finance law, election law, civil litigation, appellate practice, and United States Supreme Court practice. BLF Attorneys have participated in significant and complex litigation in various state and federal courts, including in both the Wisconsin and United States Supreme Courts. This training and experience

[65]Lead counsel, James Bopp, Jr., has been widely recognized for his competency and expertise. *See, e.g.*, Reuters, Top Practitioner before the U.S. Supreme Court (2014); National Law Journal, The 100 Most Influential Lawyers in America (2013); Journal of Law, The Top Supreme Court Advocates of the Twenty-First Century (2012).

adequately prepared them to tackle this lawsuit. *See generally* the BLF website, bopplaw.com. Third, BLF Attorneys were able to give adequate preparation and study to the matter. Finally, BLF Attorneys associated with experienced and well-regarded Wisconsin counsel for assistance in complying with local Wisconsin rules and requirements. In sum, BLF Attorneys have provided and continue to provide far above the required "proficiency . . . of a general practitioner." SCR 20:1.1, ABA Comment [1].

ii. BLF Attorneys have employed the required "thoroughness and preparation reasonably necessary for the representation."

BLF Attorneys adequately inquired into and analyzed the factual and legal elements of the underlying issues, and used methods and procedures of competent practitioners. BLF Attorneys performed significant legal research into the underlying matters and then properly applied that knowledge and preparation in their arguments. Moreover, BLF Attorneys were always properly prepared for their briefing and hearings, even when reasonable motions to continue were denied. BLF Attorneys have, at all times, employed the required thoroughness and preparation.

c. The highlighted circumstances from the circuit court do not negate BLF Attorneys' competency.

The circuit court does not contradict any of the above. Instead, the circuit court alleges that the Recusal Motion "is a manifestation of incompetency because it applies phony legal principles to invented facts" for three reasons, Recusal Supp., R. 423:86–87, R-App. 200–201, (**1**) that OSC Attorneys used "obvious logical fallacies," *id.* at 87, R-App. 201 (citing Recusal Supp. Parts B.5.e., 8.a, and 10.a), (**2**) "ignore[d] Wisconsin law and [took] offense when confronted with it," *id.* (citing Recusal Supp. Parts B.5.h, 9.a, 9.c, and 13.a), and **(3)** "ignore[d] the facts of record, or, worse, substitute[d] their own legal arguments as those facts[,]"

id. (citing Recusal Supp. Parts 11.a, 12.f.). As shown below, these statements are erroneous and do not demonstrate incompetency.

i. BLF Attorneys didn't rely on obvious logical fallacies.

The circuit court claimed that BLF Attorneys relied on "obvious logical fallacies" in three instances, all of which address the same concern: OSC's characterization of the circuit court's ruling on OSC's First Amendment in the Mandamus Order, R. 165:21, R-App. 32. Recusal Supp., R. 423:87, R-App. 201 (citing to Parts B.5.e, 8.a, and 10.a), 20–22, 29–31, 44–45, R-App. 134–136, 143–145, 158–159. The court complained that the Recusal Motion, R. 377:7, had characterized its ruling as Gableman "had no valid contract," while the circuit court had ruled "that OSC fails to demonstrate the existence of any enforceable contract . . . ." Recusal Supp. R. 423:20; *see also* Mandamus Order, R. 165:17 (ruling that Assembly "did not contractually assign confidentiality to OSC.").

First, the circuit court makes a mountain out of a mole hill, since OSC's description of the circuit court's ruling as Gableman "had no valid contract" was a perfectly accurate description of the legal effect of the circuit court ruling that "OSC fails to demonstrate the existence of any enforceable contract." *Id*. at 165:21. And the circuit court itself said that its ruling meant that Assembly "did not contractually assign confidentiality to OSC," Mandamus Order, R. 165:17, because there was no contract. Recusal Supp., R. 423:29, R-App. 143 ("I concluded that OSC failed to prove the First Amendment met each of the three elements of a contract.").

Second, the circuit court's emphasis on the exact words it used in its ruling was beside the point. The Recusal Motion didn't claim this "ruling," however characterized, was biased. Recusal Mem., R. 377:7. Instead, OSC took issue with the circuit court being on both sides of the same issue. The circuit court (**1**) found

that OSC had failed to prove there was a valid contract when doing so precluded OSC from benefitting from its confidentiality provision, while **(2)** simultaneously acting as if there was a continuing contract, when that would benefit AO, such as requiring Gableman to produce documents. Recusal Motion, R. 377:7 (taking issue with the circuit court finding Gableman's appointment had "ended," yet requiring Gableman to produce documents (citing 1/21/22 Hr'g Tr., R. 148:40:23-41:2 ("[OSC] and, in particular, [] Gableman, should produce all documents . . . within ten days.")). Indeed, as the circuit court acknowledged, a contractor cannot be responsible for legal records and production "after the termination of a contract," *id.* at 148:25:20–26:5, so, if the contract was in fact expired and the parties had failed to prove the existence of a continuing contract, the circuit court could not order Gableman to do anything. Yet, that is exactly what the circuit court did and *that* is what OSC took issue with in its Recusal Motion.

Finally, the circuit court took issue with this one instance of phrasing and then calls it a "logical fallacy," but that hardly addresses the issue. Even if OSC used the wrong terminology, or committed this one logical fallacy, such action does not negate overall the competence demonstrated by BLF Attorneys throughout both their entire careers and this specific litigation, nor does it demonstrate incompetence to the level necessary to violate the rules of professional conduct.

ii. BLF Attorneys never ignored Wisconsin law, nor took offense to Wisconsin law.

The circuit court claimed that there were four instances where BLF Attorneys either "ignored Wisconsin law," or would "take offense when confronted with it." Recusal Supp., R. 423:86–87, R-App. 200–201 (citing to Parts B.5.h, 9.a, 9.c, 13.a), 25–27, 39, 42–43, 64–65. R-App. 139–141, 153, 156–157, 178–179. BLF Attorneys never did so.

Part B.5.h "There is no evidence that I demeaned OSC's counsel."

OSC claimed that the circuit court "treated Atty. Bopp and his arguments dismissively, calling them 'strawman arguments' and 'misstatements and exaggerations.'" Recusal Motion, R. 377:8. In response, the circuit court first claims "[Judge Remington] never said [those words]," Recusal Supp., R. 423:25, R-App. 139, but then immediately switches gears and quotes the two cited sections in which *Judge Remington said those exact words*, *id*. (citing 1/21/22 Hr'g Tr., R. 148:55:5–7, 8–13).

Similarly, OSC claimed that, "though Atty. Bopp said nothing whatever about 'politics,' J. Remington again responded dismissively and accused him of injecting them[.]" Recusal Mot., R. 377:8. In response, the circuit court excerpts a quote in which Judge Remington stated he wouldn't "be distracted by the politics surrounding this simple legal question." Recusal Supp., R. 423:26, R-App. 140 (citing 1/21/22 Hr'g Tr., R. 148:52). The circuit court then states that "a reasonable person might characterize my interruption as a dismissive response. A dismissive response is the appropriate form of response when a litigant discusses immaterial issues." *Id*. at 423:26–27, R-App. 140–141. So in each instance cited by OSC, the circuit court did what OSC alleged. And nowhere does the circuit court cite to any substantive Wisconsin law BLF Attorneys ignored.

Part 9.a "There is no evidence I demeaned OSC's counsel for not understanding Wisconsin efiling statutes."

OSC took issue with the circuit court claiming that Attorney Dean called the clerk to "complain that he did not understand how to e-file records." Recusal Motion, R. 377:13. The circuit court claimed this was an "accurate[] descri[ption]" of this incident. Recusal Supp., R. 423:39, R-App. 153.

Attorney Dean, however, didn't call to "complain," but rather to ask for direction from the clerk because the standard forms the circuit court instructed OSC to use for filing documents under seal provided for distribution to all parties,

which was contrary to the circuit court's order. Dean Letter to Court, R. 174:1–2. In response, the circuit court, via letter, instructed OSC to file hard copies only:

> Today my staff received a telephone call from Mr. Dean inquiring about the procedure regarding the filing of the records. I instructed my staff to tell Mr. Dean to deliver hard copies to the court. CCAP does not allow us to use thumb drives and the logistics of e-filing that volume of records is problematic. For now, we will accept hard copies. . . . If I determine, after applying the balancing test, some records should be released, I will then file those in the court record. . . .

Correspondence from Court to OSC Counsel regarding instructions for complying with Order to Produce, Jan. 31, 2022, R. 121, R-App. 213 ("**Production Instructions**").

BLF Attorneys understand Wisconsin's e-filing requirements, are well versed in e-filing, and have consistently complied with those requirements. However, in producing the documents for *in camera* review, BLF Attorneys were following the instructions of the circuit court.

The OSC attorney's simple compliance question, thus, was not an example of them ignoring Wisconsin law or taking offense to it, but instead demonstrates a desire to comply with instructions from the circuit court.

Part 9.c "There is no evidence that I demeaned Atty. Bopp counsel [sic] by giving him a hollow compliment."

OSC alleged that the circuit court's "compliments" to Attorney Bopp "rang . . . hollow," given the circuit court's tone, demeanor, and actions throughout the entirety of the case. Recusal Motion, R. 377:15. In response, the circuit court "offer[ed] no response whatsoever, except to note the astounding waste of public resources in the drafting of allegations like this." Recusal Supp., R. 423:43, R-App. 157 (saying that "the public pays OSC's out-of-state lawyers up to $450.00/hr."). The circuit court cited no Wisconsin law that BLF Attorneys ignored or took offense to.

Part 13.a "There is no evidence I demeaned OSC's counsel."

OSC took issue with the circuit court telling Attorney Dean that "every lawyer who can read a statute" would know that incarceration is a possible sanction for contempt. Recusal Motion, R. 377:30; 6/10/22 Hr'g Tr., R. 322:8:3–8. Of course, the issue was not whether incarceration was a possible sanction, when the circuit court suggested it in the hearing on June 8, *supra* pp. 32–33, but that the circuit court's last-minute perceived threats to Niemierowicz, that, if he testified, he could be "spontaneously" ordered to jail, deprived OSC of its indispensable witness and, as a result, a continuance was necessary, *id*. at 32–34. BLF Attorneys did not ignore any Wisconsin law and took no offense to the Wisconsin statutory scheme for contempt.[66]

Likewise, OSC complained that the circuit court took issue with Attorney Dean not providing notice of the request for continuance before the hearing—when Attorney Dean was not aware of the need for a continuance until *after business hours the night before*. Recusal Motion, R. 377:30. Again, in response, the circuit court cited no ignored Wisconsin law, nor any Wisconsin law to which OSC took offense. Recusal Supp., R. 423:65, R-App. 179.

iii. BLF Attorneys didn't ignore the facts of record, nor substitute their own legal argument as facts.

The circuit court cited two incidents as demonstrating that BLF Attorneys "ignore[d] the facts of record, or, worse, substitute[d] their own legal arguments as those facts." Recusal Supp., R. 423:87, R-App. 201 (citing Parts 11.a, 12.f), 47–48, 59–62, R-App. 161–162, 173–176). BLF Attorneys did not do so.

[66]OSC attorneys did, however, maintain that imprisonment would be a grossly disproportionate sanction. 6/8/22 Hr'g Tr., R. 314:48:21–25, R-App. 252 ("incomprehensibly disproportionate"); 6/10/22 Hr'g Tr., R. 322:11:2 ("incomprehensible"), 11:6 (a "shock"), 13:5–6 ("beyond the pale").

Part 11.a "There is no evidence OSC had rebutted the prima facie case of contempt by the time of the April 26, 2022 hearing."

In this section, the circuit court takes issue with a section in OSC's Modify Opp'n, R. 225:2–7, which is labeled "Facts." OSC claimed there that, by the April 26, 2022 Status Conference, OSC had already produced the disputed documents to AO. *Id.* at 225:4 (citing Modify Motion, R. 196, acknowledging April 8 response letter, including disputed documents, *id.* at 4). The Recusal Motion cited this record. R. 377:19. The circuit court claims that this was substituting argument for facts. Recusal Supp., R. 423:47–48, R-App. 161–162.

The circuit court is correct that the Facts section of OSC's Modify Opp'n, R. 225:2–7, didn't contain citations, but as the first paragraph of the Facts section explicitly stated: "[f]ollowing are facts OSC *will present at the [contempt] hearing*," *id*. at 225:2 (emphasis added), so that it was clear that these facts were not already part of the record to cite to. The circuit court did not take into account this explanation.

Of course, as explained, OSC never had the opportunity to present evidence at the contempt hearing, as the witness who was able to testify to those facts refused to appear after the perceived threats from the circuit court. *Supra* pp. 32–34. Nevertheless, the circuit court had already admitted that the documents had already been produced to AO. 4/26/22 Hr'g Tr., R. 324:23:19–20 ("certain documents were omitted and have since been produced"), 26:23–27:2, 27:14–16.

So BLF Attorneys did not substitute its legal arguments for facts.

Part 12.f "There is no evidence I improperly threatened OSC's witness."

OSC also claimed that in the June 8 hearing, the circuit court appeared to threaten OSC's only witness for the June 10 contempt hearing, Niemierowicz, causing him not to appear to testify. Recusal Motion, R. 377:26–27. The circuit court disputes this. Recusal Supp., R. 423:59–62, R-App. 173–176. This is, of course, well-plowed ground, *see supra* pp. 32–34, 81–84 (reason to vacate

Contempt Order for failure to grant continuance), 98–99 (demonstrates bias by predetermination), where many of the circuit court's arguments are refuted.

This Court will likely resolve the dispute of whether the circuit court's incarceration comments can be reasonably characterized or reasonably perceived as a threat, but BLF Attorneys were not "ignoring facts of the record," or substituting legal arguments for facts, in making that argument.

2. BLF Attorneys abided by the rules of professional conduct.

The circuit court also claimed that BLF Attorneys' Recusal Motion "briefing demonstrate[d] unwillingness to abide [sic] the rules of professional conduct," by making "false statements of fact and law[,]" thus violating the rule "requir[ing] 'candor to the tribunal.'" Recusal Supp., R. 423:87, R-App. 201 (citing SCR 20:3.3(a)).

SCR 20:3.3(a)(1) provides that "[a] lawyer shall not knowingly: [] make a false statement of fact or law to a tribunal . . . ." A reviewing court will determine if there is "clear and convincing evidence that [the attorney] violated SCR 20:3.3[]." *In re Disciplinary Proc. Against Alia*, 2006 WI 12, ¶ 39, 288 Wis. 2d 299, 316–17, 709 N.W.2d 399, 407–08 (2006). The reviewing court will not overturn such a finding unless clearly erroneous, but reviews "conclusions of law de novo." *Id*. (citations omitted).

Here, the circuit court provides no reference to what statements the court claims violate SCR 20:3.3, much less any clear and convincing evidence. Nevertheless, a quick review of the Recusal Supplement reveals that the circumstances the circuit court claimed were false were, in fact, true. *Compare, e.g.*, Recusal Supp., R. 423:10, R-App. 124 (stating that OSC claimed the circuit court misstated that OSC had filed its motion only 24 hours before the hearing but "I did not say what OSC says I did.") *with* Order Denying Motion for Continuance, R. 82:2 (stating that "[f]iling a motion for a continuance 24 hours before the date

set by the Court for a response is untimely"); Recusal Supp., R. 423:25, R-App. 139 ("I never said [arguments were 'strawman arguments' or 'misstatements and exaggerations']") *with id*. (block quoting the times he said those exact words); *id*. at 423:27–28, R-App. 139–140 (suggesting OSC violated the e-filing requirements) *with* Letter from Circuit Court, R. 121, R-App. 213 (instructing OSC to deliver hard copies and that the *circuit court* would e-file them).

Finally, assuming arguendo, that there were any misstatements, there is no clear and convincing evidence that the lawyers knew such statements to be false, a necessary prerequisite to a finding of a violation. SCR 20:3.3 ("[a] lawyer shall not knowingly[] . . . "). Instead, OSC's Recusal Motion contained reasonable interpretations of the statements and actions by the circuit court and didn't violate SCR 20:3.3.

3. BLF Attorneys consistently abided by the rules of decorum.

The circuit court finally found that BLF Attorneys didn't abide by the rules of decorum because of their "baseless accusations and also their in-court conduct." Recusal Supp., R. 423:87, R-App. 201. As shown above, the Recusal Motion was not baseless, but strongly grounded in both law and fact.

As to attorneys' in-court conduct, SCR 10.03(4)(e) does not explicitly state which "rules of decorum" should be followed; however, SCR 62.02 provides Standards of Courtesy and Decorum for the Courts of Wisconsin, which states that judges and attorneys shall act cordially, respectfully, civilly, abstain from "disparaging, demeaning or sarcastic remarks."[67] BLF Attorneys abided by all of

[67]SCR 20:3.5 also provides rules for "decorum of the tribunal," but does not appear to be at issue.

the rules of decorum throughout the entirety of this action and the two cited circumstances do not show otherwise.[68]

First, while the circuit court suggests that Attorney Bopp "sp[oke] over the judge[,]" Recusal Supp., R. 423:87, R-App. 201(citing 4/26/22 Hr'g Tr., R. 324:16–17), the circuit court fails to acknowledge that the hearing took place via Zoom,[69] where it is all too common for participants to inadvertently speak over each other because of dynamics of that technology.[70] Attorney Bopp did not *intentionally* speak over the judge. Nevertheless, even if he *had* intended to speak over the judge in this one instance, such action can not be considered an "unwillingness to abide by the rules of decorum," which requires a course of conduct. After the circuit court asked Attorney Bopp to not speak over him, the conduct didn't occur again. Accordingly, Attorney Bopp has displayed a *willingness* to abide by the rules of decorum.

Second, the circuit court suggested that Attorney Bopp "repeatedly and dismissively referr[ed] to Atty. Westerberg as 'Westerberg.'" Recusal Supp., R. 423:87, R-App. 201 (citing 8/1/22 Hr'g Tr., R. 407:70–71 (which contained two references to "Westerberg")).[71] First, it is difficult to understand how removing the

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[68]The two cited circumstances involved *only* Attorney Bopp. While Attorney Bopp has always maintained a willingness to abide by the rules, no such unwillingness has been alleged against other BLF Attorneys. Even if Attorney Bopp had displayed such unwillingness, that unwillingness cannot be attributed to the other BLF Attorneys to justify their pro hac vice revocations.

[69]4/26/22 WisEye, https://wiseye.org/player/?clientID=2789595964&eventID=2022041063&startStreamAt=1202, 20:02–21:20 (video parallel to cited hearing segment).

[70]Even the circuit court itself had technological problems or didn't hear responses. *See, e.g.*, 1/21/22 Hr'g Tr., R. 148:36:12–14 (Judge Remington: "You cut -- Mr. Bopp – Mr. Bopp, I lost your stream. I think I didn't hear the predicate on that.").

[71]One of these instances was a reference to Attorney Westerberg without the "Attorney," which Attorney Bopp regrets, 8/1/22 Hr'g Tr., R. 407:70:23–24 (in arguing that AO's attorneys did not participate in the hearing, so they should not have billed for it, while Attorney Westerberg was *present*, Attorney Bopp said, "They weren't even whispering in Westerberg's

prefix to one's name can violate the rules of decorum. Second, Attorney Bopp omitted the prefix for Attorney Westerberg two times in a nearly three hour hearing, *see generally* 8/1/22 Hr'g Tr., R. 407, something the circuit court and opposing counsel also did. *E.g.*, 8/1/22 Hr'g Tr., R. 407:83:20 (Judge Remington referring to American Oversight attorney Sarah Colombo as "Colombo"); *id*. at 76:10 (Judge Remington referring to the "affidavit of Friedman"); *id*. at 74:14–16 (Attorney Westerberg shortening Attorney Friedman's name to "Friedman"); *see also* Contempt Order, R. 327:20 (referring to Attorney Stadler as "Stadler"). The rules of decorum "are applicable to judges . . . [and] lawyers[] . . . ." SCR 62.01. Neither Attorney Westerberg, Judge Remington, nor Attorney Bopp violated the rules of decorum by these rare and inadvertent failures to use prefixes. Furthermore, such rare inadvertence is not a violation of the rules of decorum.[72]

Third, Attorney Bopp was never admonished, chastised, nor corrected by the court.[73] Without any such correction, it cannot be said that Attorney Bopp was "unwilling" to comply, which would require some sort of refusal.

These two circumstances do not demonstrate unwillingness to abide by the rules of decorum.

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ear, as far as I know."), the second instance was not where Attorney Bopp was addressing Attorney Westerberg but, instead, entries on her law firm's invoice which was being discussed, *id*. at 407:71:6–8 ("Well, of course, Westerberg and PB, as -- of course billed properly for their appearance here and their conduct of the hearing."). Neither reference could fairly be called "dismissive," and, in the second instance, the reference was complimentary.

[72]Furthermore, the circuit court has only referred to these two instances of failure to use prefixes, neither of which were dismissive, while there were 8 hearings in this case resulting in more than 500 pages of transcript.

[73]While the transcript alone could suggest that Attorney Bopp continued to omit the prefix after being corrected, the video replay makes clear that Ms. Westerberg's correction ("It's Attorney Westerberg.") was not heard and that the circuit court's standalone statement of "Ms. Westerberg" was inviting her response to Attorney Bopp's argument, not correcting Attorney Bopp's conduct. Wisconsin Eye video of 8/1/22 Hearing, https://wiseye.org/player/?clientID=2789595964&eventID=2022081003&startStreamAt=6265, 1:44:25–1:45:47.

4. BLF Attorneys' arguments were made in good faith and had a strong basis in law and in fact.

As shown throughout this brief, all of BLF Attorneys' arguments have a strong basis in law and facts. BLF Attorneys should not be penalized for making such arguments, nor for zealously representing their client.

5. BLF Attorneys were not afforded notice, an opportunity to respond, or a hearing.

While the decision to withdraw a pro hac vice admission is in the discretion of the trial court, *Jensen v. Wisconsin Patients Compensation Fund*, 2001 WI 9, ¶ 12, 241 Wis. 2d 142, 148, 621 N.W.2d 902, 905 (2001) (citation omitted), "as a matter of judicial policy, and in accordance with the proper administration of the justice system, notice and an opportunity to respond are necessary prerequisites to the revocation of an attorney's pro hac vice status," *id*. at 144.[74]

While the "form of the notice and opportunity to respond is left to the sound discretion of the circuit court," the attorney *must* be "notified of the conduct which is alleged to violate SCR 10.03(4) and the specific reason this conduct may justify revocation under the rule." *Id.* at 151.

The Wisconsin Supreme Court initially held that a formal hearing may not always be necessary, *id*., but the Supreme Court Rules formalized the requirement for a hearing, SCR 10.03(4)(e) ("A court or judge may, *after hearing*, rescind permission . . . ." (emphasis added)), in a later amendment.[75]

Taken together, an attorney must **(1)** be "notified of the conduct which is alleged to violate SCR 10.03(4) and the specific reason this conduct may justify

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[74]This procedural requirement "ensures that the attorney's reputation and livelihood are not unnecessarily damaged, protects the client's interest, and promotes more of an appearance of regularity in the court's processes." *Id.* at 151 (quoting *Johnson v. Trueblood*, 629 F.2d 302, 303 (3rd Cir. 1980)).

[75] Former rule, SCR 10.03(4) (2006), is available at https://web.archive.org/web/20060926222757/https:/www.wicourts.gov/sc/rules/chap10.pdf.

revocation under the rule," *Jensen,* 241 Wis. 2d at 151, **(2)** be provided an opportunity to respond, *id.* at 144, and **(3)** be provided a hearing on the issue, SCR 10.03(4)(e).

Like in *Jensen*, here, "revocation of the attorney[s'] pro hac vice admission[s] was never mentioned as a possible sanction," and "[t]he circuit court's *sua sponte* order rescinding [their] pro hac vice status" was done "without any form of notice or an opportunity to respond, formal or otherwise." 241 Wis. 2d at 152. This was fatal error.

BLF Attorneys were entitled to: (**1**) know what conduct the circuit court alleged violated SCR 10.03(4), (**2**) an opportunity to respond, and (**3**) a hearing. None of these occurred. On that basis alone, BLF Attorneys' pro hac vice admissions should be reinstated.

In sum, the circuit court's revocation of BLF Attorneys' pro hac vices was not justified by law or fact and done without notice or an opportunity to respond. As a result, this Court should vacate the circuit court's order revoking pro hac vice admissions. Recusal Supp., R. 423:2–3, 86-90, R-App. 116–117, 200–204.

VI. The Circuit Court Erred in Holding that OSC Attorneys' Conduct was Sanctionable.

The circuit court erroneously found OSC Attorneys' conduct was sanctionable without legal and factual justification and without notice and an opportunity to be heard. *See* Wis. Stat. §§ 802.05(2), (3).

A. Standard of Review

Whether an action was frivolous (and thus sanctionable) "involves a mixed question of law and fact." *In re Storms v. Action Wisconsin Inc.*, 2008 WI 56, ¶ 35, 309 Wis. 2d 704, 720–21, 750 N.W.2d 739, 747 (2008) (citation omitted). What an attorney "knew or should have known is a question of fact that will be sustained unless clearly erroneous." *Id*. (citation omitted). However, "whether the facts

found by the trial court support a finding of no basis in law or fact is a question of law which [the reviewing court] review[s] de novo." *Keller v. Patterson*, 2012 WI App 78, ¶ 22, 343 Wis. 2d 569, 586, 819 N.W.2d 841, 849 (Ct. App. 2012) (citation omitted).

B. Legal Standard

Wis. Stat. § 802.05(2) provides the applicable standards for filing of motions. "A finding of frivolousness . . . 'is based on an objective standard, requiring a determination of whether . . . the attorney knew or should have known that the position taken was frivolous . . . .'" *Osman v. Phipps*, 2002 WI App 170, ¶ 16, 256 Wis. 2d 589, 602, 649 N.W.2d 701, 708 (Ct. App. 2002). "All doubts regarding whether a claim is frivolous are resolved in favor of the party or attorney whom it is claimed commenced or continued a frivolous action." *Keller*, 343 Wis. 2d at 586 (citation and quotation marks omitted).

If a court determines, "*after notice and a reasonable opportunity to respond*," that Wis. Stat. § 802.05(2) has been violated, the court "may impose an appropriate sanction[.]" Wis. Stat. § 802.05(3) (emphasis added). This can be accomplished via motion or on the court's "own initiative" by "enter[ing] an order describing the specific conduct that appears to violate sub. (2) and directing an attorney, law firm, or party to show cause why it has not violated sub. (2) with the specific conduct described in the court's order." *Id*. at § 802.05(3)(a)(2). A sanction may only be imposed to "deter repetition of such conduct or comparable conduct by others similarly situated." *Id*. at § 802.05(3)(b).

C. OSC arguments were not frivolous.

The circuit court held that it "could sanction OSC and each of its seven lawyers for their specious legal arguments under Wis. Stat. § 802.05(2)(b) . . . [and] for their baseless factual statements under Wis. Stat. § 802.05(2)(c)." Recusal Supp., R. 423:88, R-App. 202. While the circuit court stopped short of

actually imposing a sanction, *id*. at 423:88–89, R-App. 202–203, because the case was already on appeal, such action doesn't negate its finding that OSC and its attorneys' conduct was sanctionable.

However, OSC has shown here that the Recusal Motion was (**1**) submitted to the best of OSC's attorneys' "knowledge, information, and belief," formed after a reasonable inquiry, (**2**) was supported by existing law *and* a nonfrivolous argument for reversal of existing law, and (**3**) was backed by evidentiary support, Wis. Stat § 802.05(2)(b), (c), and thus was not frivolous.

Moreover, the circuit court performed *no* analysis, let alone the required analysis, to determine whether, if OSC's arguments were frivolous, OSC Attorneys knew or should have known that their position was frivolous. Nor did the circuit court resolve all doubts in favor of OSC Attorneys.

Thus, there is no legal or factual justification for the circuit court's sanction finding.

D. The court found OSC Attorneys' conduct sanctionable without notice or an opportunity to be heard.

Since the circuit court found that all of OSC's Attorneys engaged in sanctionable conduct without "notice and a reasonable opportunity to respond," the finding should be set aside for at least this reason alone.

As a result, this Court should vacate the circuit court's finding of sanctionable conduct. Recusal Supp., R. 423:88–89, R-App. 200–203.

Conclusion

This Court should reverse the numerous errors below by vacating the Mandamus Order, R. 165, R-App. 11, Order Denying Stay, R. 177, R-App. 64, and Judgment, R. 497, R-App. 319, which ordered OSC to produce records under the Public Records Law and imposed punitive damages; vacating the Contempt Order, R. 327, R-App. 82, which found OSC in contempt of the Mandamus Order;

vacating in part the Purge Order, R. 424, R-App. 205, which imposed remedial sanctions; vacating the denial of OSC's request for continuance, 6/10/22 Hr'g Tr., R. 322:50-12–14, R-App. 273:12–14; vacating the Recusal Order, R. 379, R-App. 108, which denied the recusal motion, and ordering Judge Remington to recuse; and vacating the order revoking BLF Attorneys' *pro hac vice* admissions and finding OSC Attorneys' conduct sanctionable, Recusal Supp., R. 423:2–3, 86–90, R-App. 116–117, 200–204.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 34,960 words, calculated using the word count function of WordPerfect 2020.

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